Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term 1997

ALEXANDER S., *et al.*,
Petitioners,

v.

FLORA BROOKS BOYD, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED

Do the restrictions on attorneys' fees in § 803(d) of the Prison Litigation Reform Act of 1995 apply to an application for fees filed on behalf of incarcerated juveniles when the case was pending, and prevailing party status established, prior to the effective date of the Act?

LIST OF PARTIES

The parties to the proceedings below were the petitioners Robert H. Burnside, Special Master; Alfred S., Benny B., Christopher M., Lafayette M., and Ricky S. by and through their Guardian ad Litem Lesly A. Bowers; and Inez Moore Tenenbaum, individually and as a representative of a class of juveniles.

The respondents before this Court are Richard E. McLawhorn, individually and in his official capacity as former Commissioner of the Department of Juvenile Justice for the State of South Carolina; John F. Henry; Frank Maudlin; Kathleen P. Jennings; Joseph W. Hudgens; Karole Jensen; and J.P. Neal, individually and in their official capacities as former Board Members for the South Carolina Department of Juvenile Justice; and the South Carolina Department of Youth Services.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

A. The Proceedings in the District Court 4

B. The Proceedings in the Court of Appeals 7

REASONS FOR GRANTING THE PETITION 9

I. THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS 9

A. Every Court Other Than the Court Below Has Rejected the Application of the PLRA Fees Provisions to Fees Earned Prior to the Effective Date of the Act 9

B. The Decision Directly Conflicts with Decisions of the Seventh and Eighth Circuits 10

II. THE DECISION BELOW IS INCONSISTENT IN PRINCIPLE WITH DECISIONS BY THIS

COURT 12

A. The Court Below Erred in Finding a Clear Intent that the Fees Provision Apply to Pending Cases 12

B. The Court Below Erred in Failing to Draw an Inference from the Explicit Provision for Retroactivity in § 802 14

C. The Court Below Erred in Assuming that New Statutes Ordinarily Apply to Pending Cases 16

D. Application of the PLRA Fees Amendments in Cases that Were Pending on the Effective Date of the Act Would Be Manifestly Unjust 18

III. THE COURT BELOW ALSO ERRED BY APPLYING THE STATUTE TO A CASE INVOLVING JUVENILE FACILITIES 21

A. Section 1997 Distinguishes Between Juvenile and Correctional Facilities 22

B. Section 1997 Should Not Be Construed to Create Surplusage 24

C. In PLRA Congress Distinguished § 1997 from Other Sections Amended by the Act 25

D The Legislative History of PLRA supports Distinguishing the Scope of coverage of § 1997 26

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Alexander S. ex rel. Bowers v. Boyd,
113 F.3d 1373 (4th Cir. 1997) ..... passim

Alexander S. ex rel. Bowers v. Boyd,
876 F. Supp. 773 (D.S.C. 1995) 5

Blissett v. Casey, 969 F. Supp. 118 (N.D.N.Y. 1997) 10

Bradley v. School Board, 416 U.S. 696 (1974) ..... passim

Browning v. Vernon, No. Civ. 91-0409-5-BLW
(D. Idaho March 7, 1997) 10

Coleman v. Wilson, No. CIV 5-90-0520 LKK JFM
(E.D. Cal. Jan. 21, 1997) 10

Cooper v. Casey, 97 F.3d 914 (7th Cir. 1996) 9, 11

Duran v. Carruthers, 97 F.2d 1492 (10th Cir. 1989) 20

Farmer v. Brennan, 511 U.S. 825 (1994) 24

Freytag v. Commissioner, 501 U.S. 868 (1991) 24

Hadix v. Johnson, 965 F. Supp. 996
(W.D. Mich. 1997) 10

Hadix v. Johnson, 947 F. Supp. 1113
(E.D. Mich. 1996) 10-12

Hughes Aircraft Co. v. United States ex rel. Shumer
117 S. Ct. 1871 (1997) 17

International Union, United Automobile, Aerospace & Agriculture Implement Workers of America v. Johnson Controls, Inc., 499 U.S. 187 (1991) 24

Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996) 9, 16, 18

Landgraf v. USI Film Products, 511 U.S. 244 (1994) ..... passim

Lindh v. Murphy, 117 S. Ct. 2059 (1997) ..... passim

Madrid v. Gomez, No. C-90-3094 (N.D. Cal. June 13, 1997) 10

Mallard v. United States District Court for the S. District of Iowa, 490 U.S. 296 (1989) 21

Mekdeci ex rel. Mekdeci v. Merritt Nat'l Labs, Inc., 711 F.2d 1510 (11th Cir. 1983) 21

Miller-Bey v. Stiller, No. 93 CV-72111, 1997 U.S. Dist. LEXIS 8524 (E.D. Mich. Feb. 25, 1997) 10

Ohntrup v. Firearms Ctr., Inc., 802 F.2d 676 (3d Cir. 1986) 21

Perrier v. City of Albuquerque, No. Civ. 95-943 RLP/WWD (D.N.M. Dec. 17, 1996) 10

Tragale v. Scheel, No. CV-N-93-672-DWH (D. Nev. May 21, 1997) 10

Weaver v. Clarke, 120 F.3d 852 (8th Cir. 1977), *petition for cert. filed* (U.S. Oct. 8, 1997) (No. 97-627) 9, 11

Wharton v. Knefel, 562 F.2d 550
(8th Cir. 1977) 19

Federal Statutes

11 U.S.C.A. § 523(a) (West Supp. 1997) 25

18 U.S.C.A. § 3626 (West Supp. 1997) 14, 15, 25, 26

18 U.S.C.A. § 5039 (West Supp. 1997) 28

20 U.S.C.A. §§ 1400-1485 (West 1990
& Supp. 1997) 5

28 U.S.C. § 1254(1) (1994) 1

28 U.S.C. § 1343(a)(3) (1994) 5

28 U.S.C.A. § 1346 (West Supp. 1997) 5, 25

28 U.S.C.A. § 1915 (West Supp. 1997) 25

28 U.S.C.A. § 1932 (West Supp. 1997) 25

28 U.S.C.A. § 2254(d) (West Supp. 1997) 13

29 U.S.C.A. §§ 701-796 (West 1985 & Supp. 1997) 4

42 U.S.C.A. § 1983 (West Supp. 1997) 4

42 U.S.C.A. § 1988 (West 1994 & Supp. 1997) ..... passim

42 U.S.C. § 1997(1) (1994) ..... passim

42 U.S.C. 1997a (West Supp. 1997) 24

42 U.S.C. § 1997e (West Supp. 1997) ..... passim

42 U.S.C.A. § 5633(a)(14) (West Supp. 1995) 28

42 U.S.C.A. §§ 12101-12213 (West 1995 & Supp. 1997) 5

Pub. L. No. 104-134, 110 Stat. 13[illegible] (1996) ..... passim (Prison Litigation Reform Act of 1995)

Miscellaneous

Bureau of Justice Statistics, U.S. Dep't of Justice, *Jails and Jail Inmates 1993-1994* (1995) 28

Commerce, State & Justice Appropriations Bill, 104th Cong., 1st Sess. (1995) 15

122 Cong. Rec. H12, 165 (daily ed. Oct. 1, 1976) 19

H.R. 667, 104th Cong., 1st Sess. (1995) 15, 26

H.R. 2076 104th Cong., 1st Sess. § 802(g)(3), (5) (1995) 26

H.R. Rep. No. 1558, 94th Cong. 2d Sess. (1976) 19

S. 400, 104th Cong. 1st Sess. (1995) 15

S. Rep. No. 1011, 94th Cong. 2d Sess. (1976) 19

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in the case of *Alexander S. ex rel. Bowers v. Boyd* (4th Circuit No. 96-1950) is published at 113 F.3d 1373 and is reprinted in the appendix, p.1 *infra.* The Order denying Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc is also reprinted in the appendix, p.84 *infra.* The opinions of the United States District Court for the District of South Carolina at Columbia in the case of *Alexander S. ex rel. Bowers v. Boyd* (3:90-3062-17) were issued on February 16, 1996; May 29, 1996; and August 30, 1996 and are unreported. They are reprinted in the appendix, pp.48, 63, 71 *infra.*

JURISDICTION

The decision of the panel of the Fourth Circuit Court of Appeals was entered on May 28, 1997. Petitioners filed a timely petition for rehearing and suggestion for rehearing *en banc* on June 3, 1997. The court of appeals denied rehearing and rehearing *en banc* on July 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1997(1) (1994):

§ 1997. Definitions

As used in this subchapter —

> (1) The term "institution" means any facility or institution —

(A) which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State; and

(B) which is —

(i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;

(ii) a jail, prison, or other correctional facility;

(iii) a pretrial detention facility;

(iv) for juveniles —

(I) held awaiting trial;

(II) residing in such facility or institution for purposes of receiving care or treatment; or

(III) residing for any State purpose in such facility or institution (other than a residential facility providing only elementary or secondaryeducation that is not an institution in which reside juveniles who are adjudicated delinquent, in need of supervision, neglected, placed in State custody, mentally ill or disabled, mentally retarded, or chronically ill or handicapped); or

(v) providing skilled nursing, I intermediate or long-term care, or custodial or residential care.

42 U.S.C.A. § 1997e(d) (West Supp. 1997):

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that —

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title;

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of

attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.

STATEMENT OF THE CASE

A. The Proceedings in the District Court

This case was filed in 1990 in the District of South Carolina on behalf of a class of incarcerated juveniles. The complaint alleged violations of 42 U.S.C.A. § 1983 (West Supp. 1997) regarding the conditions of confinement of juveniles held in facilities operated by the South Carolina Department of Juvenile

Justice.[1] The district court had jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) (1994).

Following trial, the district court found a violation of the due process rights of the petitioners. *Alexander S. ex rel. Bowers v. Boyd*, 876 F. Supp. 773, 786-95 (D.S.C. 1995). The district court subsequently approved, and then modified, the remedial plan submitted by the respondents. On February 16, 1996, the district court found that the petitioners were the prevailing parties in the litigation for the purpose of the award of attorneys' fees pursuant to 42 U.S.C.A. § 1988 (West 1994 & Supp. 1997). Because the district court expected that petitioners' counsel would monitor compliance with the remedial plan, the court established a system for the submission of future petitions for attorneys' fees.

On April 26, 1996, the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (hereinafter PLRA) became effective. Section 803(d) of that Act, codified at 42 U.S.C.A. § 1997e(d) (West Supp. 1997), provides several restrictions on the award of attorneys' fees awarded pursuant to 42 U.S.C.A. § 1988, as follows:

> (d) Attorney's fees
>
> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that —
>
> (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute

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[1] The complaint also alleged violations of the Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400-1485 (West 1990 & Supp. 1997); the Rehabilitation Act of 1973, 29 U.S.C.A. §§ 701-796 (West 1985 & Supp. 1997); and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213 (West 1995 & Supp. 1997).

> pursuant to which a fee may be awarded under section 1988 of this title; and
>
> (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
>
> (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.
>
> * * *
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel.

On May 29, 1996, the district court awarded petitioners attorneys' fees for services performed by counsel from May 1995 through February 1996. The court noted the enactment of the PLRA, and that there was a dispute as to whether the statute applied to lawsuits involving juvenile facilities. The court found it unnecessary to resolve that dispute "[b]ecause the fees presently at issue were all incurred before the date of this legislation[.]" Order Awarding Attorneys' Fees, May 29, 1996, App. at 65. The court awarded approximately $189,000 in fees and costs to petitioners' counsel, at rates ranging up to $225.00 per hour for the work of lead counsel. *Id.* at 68-70. On August 30, 1996, the district court addressed petitioners' request for attorneys' fees for the period of February through June, 1996. With respect to those fees related to services performed after the effective date of the PLRA, the court decided that the restrictions did not apply because the juvenile facilities at issue in the case were not

"prisons" as the term is used in the relevant PLRA provision. The court noted that the PLRA fees amendment is codified as 42 U.S.C.A. § 1997e(d). The definitions in 42 U.S.C. § 1997 applicable to that section distinguish between a "jail, prison, or other correctional facility" and juvenile facilities. While Congress had specifically defined the term "prison" to include juvenile facilities in other sections of PLRA codified in Title 18 of the United States Code, it had not changed the distinction between juvenile facilities and prisons in § 1997 when PLRA was enacted. Accordingly, the court decided that the fees restrictions, applicable "in any action brought by a prisoner who is confined to any jail, prison, or correctional facility" were inapplicable to cases involving juvenile facilities. Order, Aug. 30, 1996, App. at 71.

B. The Proceedings in the Court of Appeals

The respondents appealed to the Fourth Circuit. A divided panel of the Fourth Circuit reversed and remanded to the district court with directions to apply the PLRA restrictions to the fee applications for work both before and after the effective date of the Act. *Alexander S. ex rel. Bowers v. Boyd*, 113 F.3d 1373, 1392 (4th Cir. 1997).

The two judges in the majority of the panel offered somewhat differing rationales for the application of the Act to work performed before the effective date of the Act. The Honorable Karen J. Williams first decided that the plain language of the fees section required that it apply to all fees awarded for work performed subsequent to the effective date of the Act. *Id.* at 1385-86. Judge Williams then determined that, under *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), application of the statute to work performed prior to the effective date of the Act would not have an impermissible retroactive effect "because the determination of attorney's fees awards, which are collateral to the main cause of action, does not attach new legal consequences to completed events." *Alexander S.*, 113 F.3d at 1388. The Honorable Diana Gribbon Motz concurred on the ground that the plain language of the statute required its application at the time the court considered the award of fees; accordingly the case did not require an analysis under *Landgraf* to determine whether such

application would have a "retroactive effect." *Id.* at 1392-93 (Motz, J., concurring). The Honorable Francis D. Murnaghan, Jr., dissented from the conclusion that the PLRA fees amendments expressly directed application to work performed prior to the effective date of the Act and from the conclusion that such application would not have a retroactive effect. *Id.* at 1394-95 (Murnaghan, J., dissenting). Indeed, he concluded that there was evidence that Congress did not intend for the statute to apply to work before the effective date of the statute. In any event, he concluded that it should not be applied retroactively in this case, since such application would be "manifestly unjust," and therefore improper under *Bradley v. School Bd.*, 416 U.S. 696, 711 (1974). *Alexander S.*, 113 F.3d at 1395 (Murnaghan, J., dissenting).

The panel also rejected the holding of the district court that the PLRA fees amendments did not apply to cases involving juvenile detention facilities. The court reasoned that the ordinary meaning of the phrase "jail, prison, or other correctional facility" in the PLRA fees amendments encompassed a juvenile detention facility. While the court acknowledged the definition in 42 U.S.C. § 1997 distinguishing between juvenile facilities and prisons, the court concluded that excluding cases involving juvenile detention facilities from the scope of the PLRA fees provisions would be inconsistent with the definition of the term "prisoner" in the fees amendments because that definition includes juveniles. It would also be inconsistent with the definition of the term "prison" in other sections of PLRA codified in Title 18 to include juvenile facilities.

The decision of the panel was entered on May 28, 1997. The petitioners requested rehearing, and suggested rehearing *en banc*, on June 3, 1997. The Fourth Circuit Court of Appeals rejected the request on July 29, 1997, with two judges dissenting and one not voting.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS

A. Every Court Other Than the Court Below Has Rejected the Application of the PLRA Fees Provisions to Fees Earned Prior to the Effective Date of the Act

Every court to decide the issue, other than the court below, has held that the limitations on the award of attorneys' fees in Section 803(d) of the Prison Litigation Reform Act of 1995, codified at 42 U.S.C.A. § 1997e(d) (West Supp. 1997), do not apply to requests for fees that were earned prior to April 26, 1996, the date that PLRA became effective.

The courts reaching this conclusion include the Courts of Appeals of the Seventh and Eighth Circuits. *See Weaver v. Clarke*, 120 F.3d 852 (8th Cir. 1997), *petition for cert. filed* (US. Oct. 8, 1997) (No. 97-627); *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996); *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996).[2] All

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[2] As noted in the Statement of the Case, this case involves work earned both before and after the effective date of the Act. The reasoning of *Jensen v. Clarke* does not distinguish between these two situations:

> The Act was not in effect when the plaintiffs' attorneys accepted this appointment, when liability and fee determinations were made, or even when we remanded this case to the District Court in light of *Farmer [v. Brennan*, 511 U.S. 825 (1994)]. When the plaintiffs' attorneys were exerting what the District Court quite fairly described as "herculean" efforts on their behalf, they expected to have their fee determined under Section 1988. If we apply the Act, those expectations will be foiled. Thus, application of the Act in this case would have the retroactive effect of disappointing reasonable reliance on prior law.
>
> * * *

the federal district courts to decide the issue have also refused to apply the PLRA fees restrictions to fees that were earned prior to the effective date of the Act. *See Blissett v. Casey*, 969 F. Supp. 118 (N.D.N.Y. 1997) (refusing to apply restrictions to attorneys' fees earned after PLRA went into effect when case was pending on effective date); *Hadix v. Johnson*, 965 F. Supp. 996 (W.D. Mich. 1997) (same); *Miller-Bey v. Stiller*, No. 93-CV 72111, 1997 U.S. Dist. LEXIS 8524 (E.D. Mich. Feb. 25, 1997) (adopting Magistrate Judge's recommendation that PLRA fee restrictions not be applied to work performed before passage of Act); *Hadix v. Johnson*, 947 F. Supp. 1113, 1114 n.1 (E.D. Mich. 1996) (applying PLRA fee provisions to work earned after effective date of Act but not to work earned prior to that date).[3]

B. This Decision Directly Conflicts with Decisions of the Seventh and Eighth Circuits

The Fourth Circuit stated in the decision below that its holding does not conflict with the decisions of the Seventh Circuit

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> [I]n this case the plaintiffs and their attorneys have proceeded from the outset under the assumption that Section 1988 would apply to this case. They have litigated for literally years under that assumption. The Act was passed after our remand to the District Court, and after the District Court's findings on remand. Indeed, it did not become law until shortly before we were prepared to decide this case once and for all. It would be "manifestly unjust" to upset those reasonable expectations and impose new guidelines at this late date.

94 F.3d. at 1202-03.

[3] There are also a number of unreported district court opinions refusing to apply the PLRA fees restrictions in cases that were pending when the Act became effective. *See Madrid v. Gomez*, No. C 90-3094 (N.D. Cal. June 13, 1997); *Tragale v. Scheel*, No. CV-N-93-672-DWH (D. Nev. May 21, 1997); *Browning v. Vernon*, No. Civ. 91-0409-S-BLW (D. Idaho March 7, 1997); *Coleman v. Wilson*, No. CIV 5-90-0520 LKK JFM (E.D. Cal. Jan. 21, 1997); *Perrier v. City of Albuquerque*, No. Civ. 95-943 RLP/WWD (D.N.M. Dec. 17, 1996).

in *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996), or the Eighth Circuit in *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996), because, in both those cases, the district court had actually awarded the contested fees prior to the effective date of PLRA. *See Alexander S.*, 113 F.3d at 1386 n.11. However, the Fourth Circuit's application of PLRA to fees earned before the effective date of the Act squarely conflicts with decisions of those Circuits. Whether or not *Alexander S.* creates a direct conflict with *Jensen* has become irrelevant. The Eighth Circuit followed *Jensen* in *Weaver v. Clarke*, 120 F.3d 852 (8th Cir. 1997), *petition for cert. filed* (U.S. Oct. 8, 1997) (No. 97-627). In *Weaver*, as in the case below, the district court awarded the fees at issue after the effective date of the Act. *Weaver v. Clarke*, 933 F. Supp. 831 (D. Neb. 1996). Accordingly, there is no way to harmonize the positions of the two circuits.

Petitioners submit that the decision below also conflicts with *Cooper v. Casey*. The Seventh Circuit stated the following in that case:

> [W]e agree with the Eighth Circuit that this provision of the Act does not have retroactive effect. *Jensen v. Clarke*, 94 F.3d 1191, 1201-03 (8th Cir. 1996). To give it such effect would attach (without clear indication of congressional intent to do so) new legal consequences to completed conduct, namely the services rendered by the plaintiffs' counsel in advance of the passage of the new Act.

97 F.3d at 921 (citations omitted).

Because the Seventh Circuit vacated the attorneys' fees award on appeal for other reasons, the opinion rejecting the application of the PLRA to fees earned prior to the effective date of the Act and remanding to the district court acts as a directive to that court regarding the award of fees on remand. Because of this directive on remand, neither the reasoning nor the holding in *Cooper* can be harmonized with *Alexander S.* Accordingly, the decision below is

in direct conflict with decisions of both the Seventh and Eighth Circuits.

II. THE DECISION BELOW IS INCONSISTENT IN PRINCIPLE WITH DECISIONS OF THIS COURT

The decision of the court below to apply the PLRA fees amendment is inconsistent with the Court's reasoning in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997). The decision also misapplies *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) and *Bradley v. School Bd.*, 416 U.S. 696 (1974).

A. The Court Below Erred in Finding a Clear Intent that the Fees Provision Apply to Pending Cases

In the decision below, the majority of the panel concluded that the plain language § 803(d) of the PLRA, codified at 42 U.S.C.A. § 1997e(d) (West Supp. 1997) evinced Congress' intent that the fees limitation apply to pending cases. The majority based this conclusion on the language of § 803(d) providing that "fees shall not be awarded, except to the extent [specified in the section]," which the majority read as a directive to apply the amendment any time that a court makes an award of fees.

The argument that § 803(d) contains a clear statement of intent that it apply to pending cases is circular. Only if the section is assumed *a priori* to apply to pending cases does the language "such fees shall not be awarded, except to the extent that . . ." convey any such intention. Without such an assumption, the phrase simply does not speak to whether the section applies to pending cases.

Moreover, the conclusion of the Fourth Circuit is flatly inconsistent with the reasoning of both the majority and the dissent in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997). In *Lindh* the Court was asked to decide whether a certain provision of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA) is applicable to cases pending when the Act was passed. The AEDPA consists of two chapters, one of which governs capital cases and explicitly provides that it "'shall apply to cases pending on or after the date of enactment of this Act.'"

Id. at 2063 (citation omitted). The other chapter — the one at issue in *Lindh* — governs noncapital cases and does not contain a comparable provision. *Id.* at 2063-65. Rather, the section of the AEDPA at issue in *Lindh* provides that "[a]n application for a writ of habeas corpus . . . shall not be granted" except as provided. 28 U.S.C.A. § 2254(d) (West Supp. 1997). If the reasoning of the court below were correct, this language would require application of the new AEDPA statute in every case in which a federal court was asked to issue a writ of habeas corpus.

The Court's treatment of the retroactivity issue in *Lindh*, however, is flatly inconsistent with such reasoning. Of particular note, the majority in *Lindh* emphasized the need for a clear statement of Congressional intent to overcome the general presumption against applying non-procedural statutes to pending cases, including statutes that "might not have a true retroactive effect." 117 S. Ct. at 2063-64. *Lindh* also demonstrates the rigor with which this Court has enforced the clear statement rules. For example, the majority opinion questioned whether language in the AEDPA providing that Chapter 154 (which was not at issue in *Lindh*) "shall apply to cases pending on or after the date of the enactment of this Act" was sufficient to qualify as a clear statement. *Id.* at 2063-64 n.4.

Futhermore the reasoning of the dissent in *Lindh* is equally inconsistent with the reasoning of the Fourth Circuit in this case:

> The first question we must ask is whether Congress has expressly resolved whether the provision in question applies to pending cases. *Landgraf v. USI Film Products*, 511 U.S. 244, 280, 114 S. Ct. 1483, 1505, 128 L.Ed. 2d 229 (1994). Here, the answer is plainly no. The AEDPA does not clearly state, one way or the other, whether Chapter 153 applies to pending cases.

Id. at 2068 (Rehnquist, C.J., dissenting).

B. The Court Below Erred in Failing to Draw an Inference from the Explicit Provision for Retroactivity in § 802

Lindh renders untenable another aspect of the reasoning of the court below. Judge Williams' opinion notes that Congress expressly provided for retroactive application in § 802 of PLRA, but § 803 contains no stated effective date. Her opinion "decline[s] to draw any negative inferences from the express inclusion of a provision making § 802 applicable to pending cases and the absence of the same from § 803." *Alexander S.*, 113 F.3d at 1387.

In contrast, the Court in *Lindh* treated a comparable distinction between sections of the statute as the decisive factor. In refusing to apply amended § 2254 to cases pending at the time of enactment of the AEDPA, the Court held that the difference between the two sections indicated Congress' intent that the latter provision should be applied only to cases filed after the date of the Act. 117 S. Ct. at 2063. The Court found this "negative implication [ ]" to be particularly pronounced because "the [two chapters] had already been joined together [in a single bill] and were being considered simultaneously when the language raising the implication was inserted," although they began life independently and in different Houses of Congress. *Id.* at 2065. The Court distinguished this legislative history from one in which "two chapters had evolved separately in the congressional process, only to be passed together at the last minute." *Id.* at 2064.

In this regard, the AEDPA is indistinguishable from the PLRA. The attorneys' fees provisions of the PLRA, amending 42 U.S.C. § 1997e, are found in § 803 of the Act. This section is silent as to whether it should be applied retroactively to pending cases or only prospectively to cases filed after the Act's passage. In stark contrast, § 802 of the Act, which addresses "appropriate remedies" in prison conditions litigation, explicitly states that the section is to be applied to pending cases, as follows:

> Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect

> to all prospective relief *whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.*

Pub. L. No. 104-134, § 802(b)(1), 110 Stat. 1321, 1321-70 (1996) (emphasis added).[4]

Furthermore, as in *Lindh*, the negative inference created by the different treatment of the two sections is particularly strong because the PLRA's legislative history shows that sections 802 and 803 "had already been joined together and were being considered simultaneously when the language raising the implication was inserted." *Lindh*, 117 S. Ct. at 2065. The precursor to the PLRA was the "Stop Turning Out Prisoners Act," known by the acronym "STOP," which was introduced as Title III of H.R. 667 in the House of Representatives and S. 400 in the Senate. In this version of the bill, the injunctive relief provisions and the attorneys' fees provisions of the PLRA appeared together in a single section that was subject to an explicit statement of its applicability to all cases then pending. *See* H.R. 667, 104th Cong., 1st Sess. § 301(b) (1995). Thereafter, S. 400 was added by the Senate Appropriations Committee as Title VIII of the Commerce, State & Justice Appropriations bill (hereinafter "CS&J bill"). During Senate floor debate on the CS&J bill, on September 29, 1995, STOP was replaced by a "Dole-Hatch substitute" bearing the name of the statute that ultimately became law. The vast majority of S. 400's provisions, including the retroactivity provision, appeared in section 802 of the substitute bill. However, the attorneys' fees provision had been extracted from this section and transferred to a new section of the bill, section 803, which did not contain a retroactivity provision. The statute retained this structure until its final passage.[5]

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[4] Section 802 and § 803 modify different titles and sections of the United States Code. Section 802 was codified at 18 U.S.C.A. § 3626 (West Supp. 1997) and § 803 was codified at 42 U.S.C.A. § 1997e(d) (West Supp. 1997).

[5] Only two changes were made to the Dole-Hatch substitute bill before its final passage. First, the numerical cap on the hourly rate that could be awarded as attorneys' fees was increased. *See* 42 U.S.C.A. § 1997e(d)(2) (West Supp. 1997). Second, a provision authorizing an

Given the inclusion of an explicit statement that § 802 apply to pending cases, and the absence of a similar provision in § 803, the reasoning in *Lindh* dictates the conclusion that Congress intended that the attorneys' fees provisions — and the other provisions found in § 803 — apply only to cases filed after the enactment of the PLRA. Accordingly, PLRA and the AEDPA are precisely parallel in structure and legislative history; in light of *Lindh*, which was decided after the decision below, the Fourth Circuit committed clear error.[6]

C. The Court Below Erred in Assuming that New Statutes Ordinarily Apply to Pending Cases

In *Alexander S.*, the opinion of Judge Williams states that "[a]bsent an express directive from Congress, we *must* apply a newly enacted statute to pending cases unless doing so would give

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award of attorneys' fees for enforcement work was added to the bill. *See* 42 U.S.C.A. § 1997e(d)(1)(B)(ii) (West Supp. 1997). These changes were made in early December 1995 by the members of the CS&J Conference Committee.

[6] In contrast, the Eighth Circuit in *Jensen v. Clark*, 94 F.3d 1191 (8th Cir. 1996), correctly anticipated *Lindh*:

> [T]here is evidence of congressional intent contrary to retroactive application of [the attorneys' fees] portion of the Act. Section 802, the section of the Act dealing with prospective relief, specifically provides that it "shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of enactment of this title." § 802(b)(1). Section 803, conversely, is silent on retroactive application. Congress saw fit to tell us which part of the Act was to be retroactively applied, Section 802. The exclusion of Section 803 and its fee provisions from that clear statement is inconsistent with the defendants' argument for retroactivity.

Id. at 1203.

the statute 'retroactive effect.'" 113 F.3d at 1387 (emphasis added). Judge Williams' opinion cites *Landgraf*, 511 U.S. at 277, for this proposition. The cited language in *Landgraf* is a description of the holding in *Bradley v. School Bd.*, 416 U.S. 696 (1969). In fact, the entire thrust of *Landgraf* was reconciling two lines of cases: one line stressing the presumption against retroactive application of statutes, and the other line, most prominently represented by *Bradley*, supporting the general applicability of new statutes to pending cases. The Court in *Landgraf* reconciled the cases by rejecting the reading of *Bradley* that Judge Williams gives it. *Landgraf* rejected a "categorical presumption" in favor of the application of all new statutes to pending cases, 511 U.S. at 277, and it construed *Bradley* not "to displace the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment." *Id.* at 278.[7]

In *Lindh*, the Court even more explicitly repudiated the argument that statutes must apply to pending cases absent retroactive effect or an express directive from Congress:

> Although *Landgraf*'s default rule would deny application when a retroactive effect would otherwise result, other construction rules may

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[7] The error of the court below is comparable to the error corrected in *Hughes Aircraft Co. v. United States ex rel. Shumer*, 117 S. Ct. 1871 (1997):

> The Ninth Circuit simply misread our decision in *Landgraf*, for the only "presumption" mentioned in that opinion is a general presumption *against* retroactivity. The fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity, not an exception to the rule itself.

Id. at 1878. Similarly, the court below erred in relying on a nonexistent rule requiring the application of statutes to pending cases.

> apply to remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case), as Lindh argues the recognition of a negative implication would do here. In sum, if the application of a term would be retroactive as to Lindh, the term will not be applied, even if, in the absence of retroactive effect, we might find the term applicable; *if it would be prospective, the particular degree of prospectivity intended in the Act will be identified in the normal course in order to determine whether the term does apply to Lindh.*

117 S. Ct. at 2063 (emphasis added).[8]

D. Application of the PLRA Fees Amendments in Cases that Were Pending on the Effective Date of the Act Would Be Manifestly Unjust

In *Bradley v. School Bd.*, 416 U.S. 696 (1974), the Court stated that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 711. Although *Lindh* has clarified that the reach of this principle is limited, even under the Court's formulation in *Bradley*, the fees provision at issue in this case should not be applied to pending cases because to do so is "manifestly unjust."

This case was reduced to judgment, and plaintiffs established their status as prevailing parties, before the passage of the PLRA. Counsel in the case are not paid on an hourly rate by the clients. Rather, they function as "private attorneys general" who receive compensation under the civil rights fee statute, 42

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[8] Similarly, the Court's decision in *Lindh* indicates that characterization of a statute as involving "secondary" rather than "primary" conduct is not talismanic with respect to retroactivity analysis. *Compare Alexander S.*, 113 F.2d at 1387 *with Lindh*, 117 S. Ct. at 2070 (Rehnquist, C.J., dissenting).

U.S.C.A. § 1988 (West 1994 & Supp. 1997). In this case, as in other cases initiated before the PLRA's passage, counsel undertook the litigation with a settled expectation that, if they prevailed, they would be compensated under § 1988 for all the hours that were reasonably spent litigating the case at the prevailing rate for attorneys with similar experience and skill.

Indeed, the very purpose of § 1988 was to create an expectation on the part of plaintiffs' counsel of an award of reasonable attorney fees in meritorious civil rights cases. The Senate and House reports that accompanied the passage of § 1988 stated that the purpose of the legislation was to ensure "effective access to the judicial process" for victims of civil rights abuse. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976). "[F]ee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation." S. Rep. No. 1011, 94th Cong., 2d Sess. 3-4 (1976). To effectuate these principles, Congress expressed its intent that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 4 (citation and internal quotation marks omitted). Any lesser standard, under which an award of fees is speculative, would defeat the purposes of the Act.[9] In this case, petitioners' expectation was reinforced by the order of the district court of February 16, 1996, making a finding that petitioners were the prevailing party and setting up a system for determining the amount of fees to be awarded to petitioners as a result of their counsels' work in monitoring compliance with the court's orders.

If the attorneys' fee provisions of the PLRA are applied to this case, petitioners would not be compensated under § 1988 at market rates for all hours reasonably spent in successfully litigating the case; instead, petitioners' counsels' fees would be

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[9] Representative Seiberling, who introduced the Act in the House of Representatives, explained that his bill "called for the mandatory award of attorneys' fees to prevailing plaintiffs because I felt that the award should be automatic except in the most extraordinary circumstances." 122 Cong. Rec. H12,165 (daily ed. Oct. 1, 1976), *quoted in Wharton v. Knefel*, 562 F.2d 550, 558 n.36 (8th Cir. 1977).

capped at $112.50 per hour[10] and the PLRA restrictions on compensable activities could mean that no fees would be awarded.[11] This amounts to a significant reduction because the district court awarded hourly rates of up to $225.00. This reduction attaches new legal consequences to events completed before the PLRA's enactment — the initiation of litigation, the assumption of representation and the establishment of prevailing party status — and it takes away rights acquired under previously existing laws. Furthermore, in cases filed before the PLRA's passage, petitioners' counsel cannot be said to have "fair notice" that their fees would be radically cut during the course of the litigation.

Moreover, petitioners' counsel cannot withdraw from the litigation merely because application of the PLRA rates requires him to work for about one-half of his usual rate. In juvenile conditions cases, like prison conditions cases, a "consent decree [is] only the beginning, and counsel for the plaintiffs has a continuing duty and responsibility to make sure that the defendants comply, and continue to comply, with the decree." *Duran v. Carruthers*, 885 F.2d 1492, 1495 (10th Cir. 1989). In most cases, ethical obligations would prevent plaintiffs' counsel from withdrawing from the case in light of the PLRA's enactment:

> An attorney who has entered an appearance in a case may not withdraw without leave of court because the court's interest in making sure that a litigant is adequately represented and that the orderly prosecution of the lawsuit is not disrupted is paramount to a lawyer's personal interest in terminating a relationship with a client.

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[10] *See Alexander S.*, 113 F.3d at 1377 n.1.

[11] *See id.* at 1391-92 (remanding for a determination of whether any fees were appropriate in light of the restrictions on compensable activities required by PLRA).

Mallard v. United States Dist. Court for the S. Dist. of Iowa, 490 U.S. 296, 316 (1989) (Stevens, J., dissenting) (citing *Ohntrup v. Firearms Ctr., Inc.*, 802 F.2d 676 (3d Cir. 1986), and *Mekdeci ex rel. Mekdeci v. Merrell Nat'l Labs., Inc.*, 711 F.2d 1510, 1521-22 (11th Cir. 1983)).

Under these circumstances, the Eighth Circuit in *Jensen* correctly determined that it would be "manifestly unjust" to upset the reasonable expectations of plaintiffs and their counsel that § 1988 would apply to this case. *See supra* pp.10-11 n.2. Because application of the fees amendment would be "manifestly unjust," *Bradley* does not support the decision below.[12]

III. THE COURT BELOW ALSO ERRED BY APPLYING THE STATUTE TO A CASE INVOLVING JUVENILE FACILITIES

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[12] In *Bradley*, the district court had awarded attorneys' fees and costs, upon general equitable principles, to parents who had prevailed in an action seeking to desegregate Richmond's public schools. While the case was pending before the Fourth Circuit Court of Appeals, Congress enacted § 718 of the Education Amendments of 1972, which authorized federal courts to award the prevailing parties in school desegregation cases reasonable attorney fees, but did not specify whether it was applicable to pending cases. The court of appeals held that the new fees provision did not authorize the award of fees for services rendered before the effective date. This Court reversed because "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711.

Notwithstanding that, as in *Bradley*, the issue here pertains to attorneys' fees, critical factors distinguish the analysis of the "manifest injustice" exception. The equities involved in applying a fees statute that *authorizes* a fees award to cases filed before passage of the statute are entirely distinct from those involved in application of a statute that *deprives* a court of such authorization. In the latter but not the former circumstance, the application of an amendment fails to protect plaintiffs' counsel's reasonable reliance on the prior version of the statute in deciding to undertake the litigation. Accordingly, although application of a new fees statute was not unfair in *Bradley*, it is "manifestly unjust" here.

The court below applied 42 U.S.C. § 1997e(d) (West Supp. 1997) to the petitioners, who are juveniles confined in facilities operated exclusively for juveniles. In so doing, the court below erred in four ways. The court ignored the fact that Congress in PLRA defined the scope of the Act's coverage differently in the § 1997 amendments from the scope of the PLRA amendments codified elsewhere; the court failed to apply the definitions Congress specified were to apply to § 1997e(d); the court construed the section in a manner that renders some of its language meaningless; and the court ignored the inference created by PLRA's legislative history.

A. Section 1997 Distinguishes Between Juvenile and Correctional Facilities

As amended by PLRA, 42 U.S.C.A. § 1997e(h) (West Supp. 1997) defines the term "prisoner," as used in § 1997e, to include juveniles. A "prisoner" is "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary program." Accordingly, if Congress had simply provided in § 1997e(d) that the new fees provision applied "in any action brought by a prisoner," then cases involving juveniles adjudicated as delinquents brought after the effective date of the Act would be within the scope of the Act's coverage.

Significantly, however, this is not how Congress worded the fees provision in § 1997e(d). Rather, Congress added a restrictive clause specifying that the section applies "[i]n any action brought by a prisoner *who is confined to any jail, prison, or other correctional facility.*" (Emphasis added). The phrase "confined to any jail, prison, or other correctional facility" echoes a distinction made in the definitional section, § 1997(1)(B)(ii):

§ 1997. Definitions

As used in this subchapter

(1) The term "institution" means any facility or institution —

(A) which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State; and

(B) which is —

(i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;

(ii) *a jail, prison, or other correctional facility*;

(iii) a pretrial detention facility;

(iv) *for juveniles* —

(I) held awaiting trial;

(II) residing in such facility or institution for purposes of receiving care or treatment; or

(III) residing for any State purpose in such facility or institution (other than a residential facility providing only elementary or secondary education that is not an institution in which reside juveniles who are adjudicated delinquent, in need of supervision, neglected, placed in State custody, mentally ill or disabled, mentally retarded, or chronically ill or handicapped); or

> (v) providing skilled nursing, intermediate or long-term care, or custodial or residential care.

42 U.S.C. § 1997(1) (1994) (emphasis added).

Thus, in the PLRA fee amendments Congress used the limiting phrase "a prisoner who is confined to any jail, prison, or other correctional facility," which it borrowed from the definitional section of the subchapter. Moreover, the distinction in the definitional section between juvenile facilities and "a jail, prison, or other correctional facility" is relied upon elsewhere in § 1997 to distinguish the legal protections of those confined in the two sets of institutions. Pursuant to § 1997(a), the Attorney General can initiate litigation to protect the statutory rights of persons confined in juvenile facilities, but not persons confined in facilities specified in § 1997(1)(B)(ii), *i.e.*, persons confined to a "jail, prison, or other correctional facility." Accordingly, the use of the phrase "jail, prison, or other correctional facility" in § 1997e(d) to restrict the scope of applicability of the fees amendment should be interpreted in conjunction with the definitional section of § 1997 to exclude juvenile facilities.

B. Section 1997 Should Not Be Construed to Create Surplusage

Moreover, if the court below is correct, the language "who is confined to any jail, prison, or other correctional facility" performs no function; the section would mean exactly the same thing with or without this language qualifying the reference to "prisoner." This Court has "consistently" expressed a "'deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'" *Freytag v. Commissioner*, 501 U.S. 868, 877 (1991) (citation omitted); *see also International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991) (rejecting interpretation that would render surplusage

language restricting the scope of a statutory exception).

C. In PLRA Congress Distinguished § 1997 from Other Sections Amended by the Act

These are not the only compelling indicia of a Congressional intent to restrict the scope of coverage of the fees amendment through the reference to a "prisoner who is confined to any jail, prison, or other correctional facility." In other sections of PLRA,[13] but not in the amendments to this subchapter, a specific definition is provided making clear that the amendments do apply to juveniles. The PLRA amendments to 18 U.S.C.A. § 3626 (West Supp. 1997) specify the following:

> Definitions — *As used in this Section* —
>
> * * *
>
> (5) the term "prison" means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law[.]

Id. § 3626(g)(5) (emphasis added).[14]

Accordingly, to adopt the Fourth Circuit's construction of § 1997, one not only has to discard as surplusage the restrictive clause

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[13] The PLRA amendments are codified in Titles 11 and 28, as well as Title 18 and Title 42. *See* 11 U.S.C.A. § 523(a) (West Supp. 1997); 28 U.S.C.A. § 1915 (West Supp. 1997); 28 U.S.C.A. § 1346 (West Supp. 1997); 28 U.S.C.A. § 1932 (West Supp. 1997).

[14] The portion of PLRA codified in 18 U.S.C. § 3626 provides limits on the scope and duration of injunctive relief in conditions of confinement cases.

in the fees amendments in § 1997e(d), but one must also construe part of the unamended definitional section in § 1997(1)(B)(iv) as surplusage, and utilize in § 1997 a definition from 18 U.S.C.A. § 3626 that Congress expressly limited to the latter section.

D. The Legislative History of PLRA Supports Distinguishing the Scope of Coverage of § 1997

The legislative history also supports petitioners' argument. In the original version of PLRA, the fees amendments were placed in 18 U.S.C.A. § 3626 and provided that no attorneys' fees under 42 U.S.C.A. § 1988 "may be granted to a plaintiff in a civil action with respect to prison conditions" except as provided by the section,[15] and the term "prison" was defined to include "any . . . facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law."[16]

A later version of the bill that became PLRA transferred the fees provisions from 18 U.S.C.A. § 3626 to 42 U.S.C.A. § 1997e(d). The provisions that remained in 18 U.S.C.A. § 3626 retained the express application to juvenile facilities. The definition of "prison" from § 3626, however, did not reappear in the provisions of PLRA amending § 1997. *Compare* H.R. 2076, 104th Cong., 1st Sess. § 802(g)(3), (5) (1995) *with* Pub. L. No. 104-134, § 803(d), 110 Stat. 1321, 1321-71 (1996) (codified at 42 U.S.C.A. § 1997e(d) (West Supp. 1997)). As in *Lindh*, a strong inference arises that Congress' use of different language and different definitions in the two sections was deliberate and reflects Congress' intent to treat juvenile facilities differently in the two sections.

The principal objection to construing § 1997e(d) as inapplicable to juvenile facilities is that the section defines "prisoner" to include any person "incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or

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15 H.R. 667, 104th Cong., 1st Sess. § 301(f) (1995).

16 *Id.* at § 301(g).

diversionary program." § 1997e(h). This is the same definition of "prisoner" contained in 18 U.S.C.A. § 3626. The Fourth Circuit suggested that § 1997e(h) would not use this definition unless Congress meant the fees restrictions to apply to cases involving juvenile facilities.

This objection is not well-founded. Prior to the PLRA amendments, § 1997e dealt solely with administrative exhaustion requirements in prison cases. The relevant provision of § 1997 provided as follows:

> Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall [impose an administrative exhaustion requirement].

42 U.S.C. § 1997e(a)(1) (1994). PLRA amended this section to read as follows: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C.A. § 1997e(a) (West Supp. 1997). Under the previous version of the section, a person under eighteen years of age convicted as an adult and confined in an adult facility would nonetheless not be subject to exhaustion of the administrative grievance system to which all other prisoners at the facility were subjected. By defining the term "prisoner" but not amending the definition of "prison," Congress subjected all juveniles held in adult facilities to the same exhaustion requirements as adult prisoners, but did not impose an exhaustion requirement on those juveniles held in juvenile facilities. While there is other language Congress could have chosen that would have worked as well, this is the language Congress chose to distinguish between juveniles in juvenile facilities, on the one hand, and adults and juveniles confined in correctional facilities, on the other hand.

The court below also reasoned that petitioners' construction of the statute creates surplusage. The definition in §

1997 of "prisoner" to include juveniles becomes surplusage unless there is some reason to distinguish between juveniles in adult facilities and juveniles in juvenile facilities. The court posited that there is no need to distinguish the two categories because "a juvenile who is simply 'accused of' a crime or even 'adjudicated delinquent' would not, under normal circumstances, be confined to an adult state facility." *Alexander S.*, 113 F.3d at 1385.

This factual premise, however, is simply incorrect. According to the Bureau of Justice Statistics, in 1994 only 76% of juveniles held in jails had been tried, or were scheduled to be tried, under the adult criminal code. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Jails and Jail Inmates 1993-1994* 7 (1995).[17] The court below also cited 18 U.S.C.A. § 5039 (West Supp. 1997), which applies only to juveniles in federal custody, for the proposition that 18 U.S.C.A. § 5039 prohibits the placement of juveniles in adult federal facilities. *See Alexander S.*, 113 F.3d at 1385. In fact, the statute prohibits placement in adult facilities only if the juvenile would have "regular contact" with incarcerated adults. Similarly, while federal law mandates that states comply with certain restrictions to be eligible for federal grants to address juvenile delinquency problems, those federal restrictions also do not require the complete removal of juveniles processed in the juvenile justice system from adult jails and lock ups. *See* 42 U.S.C.A. § 5633(a)(14) (West Supp. 1995).

The only way Congress could cover all adult correctional facilities in all circumstances was to cover all juveniles, whether or not waived for criminal proceedings, held in adult facilities. While Congress intended to include juveniles in adult facilities within the scope of the fees amendment, it does not follow that Congress intended the fees amendment to apply to juveniles in separate juvenile facilities.

Accordingly, petitioners urge that the Court grant certiorari to review the Fourth Circuit's determination that § 1997e(d) applies to prevailing plaintiffs in cases involving conditions of confinement in juvenile facilities.

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[17] 1994 is the most recent year for which the Bureau of Justice Statistics has published data.

CONCLUSION

For the above reasons, petitioners request that the Court grant this petition for writ of certiorari to the Fourth Circuit Court of Appeals.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term 1997

ALEXANDER S., *et al.*,

Petitioners,

v.

FLORA BROOKS BOYD, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appendix to Petition for Writ of Certiorari

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8988

TABLE OF CONTENTS
Appendix to the Petition

Opinion
United States Court of Appeals
for the Fourth Circuit
entered May 28, 1997 ..... App. 1

Interim Order on Staffing Issues
and Attorney Fees
United States District Court
District of South Carolina
Columbia Division
entered February 16, 1996 ..... App.48

Order Awarding Attorney Fees
United States District Court
District of South Carolina
Columbia Division
entered May 29, 1996 ..... App. 63

Order Awarding Attorney Fees
For The Period of February - July 1996
United States District Court
District of South Carolina
Columbia Division
entered August 30, 1996 ..... App. 71

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc
United States Court of Appeals
for the Fourth Circuit
entered July 29 1997 ..... App. 84

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALEXANDER S.; ALFRED S.; BENNY B.;
CHRISTOPHER M.; LAFAYETTE M.; RICKY S.,
by and through their Guardian ad Litem;
LESLY A. BOWERS, Guardian ad Litem,
Plaintiffs-Appellees,

and

INEZ MOORE TENENBAUM,
individually and as a representative of a class of juveniles,
Plaintiff,

v.

FLORA BROOKS BOYD,
individually and in her official capacity as
Director of the Department of Juvenile Justice,
Defendant-Appellant,

and

RICHARD E. MCLAWHORN,
individually and in his official capacity as
former Commissioner of the Department of Juvenile Justice
for the State of South Carolina; JOHN F. HENRY;
FRANK MAUDLIN; KATHLEEN P. JENNINGS;
JOSEPH W. HUDGENS; KAROLE JENSEN; J. P. NEAL,
individually and in their official capacities as
former Board Members for the South Carolina Department of
Juvenile Justice; SOUTH CAROLINA DEPARTMENT OF
YOUTH SERVICES,
Defendants,

MICHAEL W. MOORE, Director of the South Carolina Department of Corrections,

Party in Interest,

v.

RICHARD A. HARPOOTLIAN,
in his official capacity as the Solicitor for
the Fifth Judicial Circuit,

Amicus Curiae-Movant.

THOMAS DAVIS,

Special Master,

ALEXANDER S.; ALFRED S.; BENNY B.;
CHRISTOPHER M.; LAFAYETTE M.; RICKY S.,
by and through their Guardian ad Litem;
LESLY A. BOWERS, Guardian ad Litem,

Plaintiffs-Appellees,

and

INEZ MOORE TENENBAUM,
individually and as a representative of a class of juveniles,

Plaintiff,

v.

FLORA BROOKS BOYD,

Defendant-Appellant,

RICHARD A. HARPOOTLIAN,
in his official capacity as the Solicitor for
the Fifth Judicial Circuit,

Movant,

and

RICHARD E. MCLAWHORN,
individually and in his official capacity
as former Commissioner of the Department of Juvenile Justice
for the State of South Carolina;
JOHN F. HENRY; FRANK MAUDLIN; KATHLEEN P. JENNINGS; JOSEPH W. HUDGENS; KAROLE JENSEN;
J. P. NEAL, individually and in their official capacities
as former Board Members for the South Carolina Department
of Juvenile Justice; SOUTH CAROLINA
DEPARTMENT OF YOUTH SERVICES,
Defendants,

MICHAEL W. MOORE,
Director of the South Carolina Department of Corrections,
Party in Interest.

No. 96-1950
No. 96-2589

Appeals from the United States District Court
for the District of South Carolina, at Columbia.
Joseph F. Anderson, Jr., District Judge.

(CA-90-3062-3-17)

Argued: December 5, 1996
Decided: May 28, 1997
Entered: May 28, 1997

Before MURNAGHAN, WILLIAMS, and MOTZ Circuit Judges.

Affirmed in part, reversed in part, and remanded by published opinion. Judge Williams wrote the opinion. Judge Motz wrote a separate opinion in which she concurred in Parts I., II., III. A. and C., IV., and in the judgment. Judge wrote a dissenting opinion.

COUNSEL

ARGUED: Edward Mobley Woodward, Jr., WOODWARD, COTHRAN & HERNDON, Columbia, South Carolina, for Appellant. W. Gaston Fairey, FAIREY, PARISE & MILLS, P.A., Columbia, South Carolina, for Appellees. **ON BRIEF:** Carolyn C. Matthews, WOODWARD, COTHRAN & HERNDON, Columbia, South Carolina, for Appellant. Rochelle Romosca McKim, FAIREY, PARISE & MILLS, P.A., Columbia, South Carolina; Nancy C. McCormick, PROTECTION AND ADVOCACY FOR PEOPLE WITH DISABILITIES, INC., Columbia, South Carolina; Lesly A. Bowers, Columbia, South Carolina, for Appellees.

OPINION

WILLIAMS, Circuit Judge:

In this appeal we must decide whether the recently enacted limitations on attorney's fee awards set forth in § 803(d) of the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified at 42 U.S.C.A. § 1997e (West Supp. 1997)), apply to attorney's fees awarded to Plaintiffs, a group of incarcerated juveniles who have successfully challenged the constitutionality of juvenile prison conditions in the state of South Carolina. Section 803(d) provides that no attorney's fees shall be awarded to a "prisoner who is confined to any jail, prison, or other

correctional facility" in an action seeking redress for unconstitutional prison conditions unless:

> (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's right protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and
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> (B) (i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
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> (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

§ 803(d)(1) (codified at 42 U.S.C.A. § 1997e(d)(1)). In addition, any award made pursuant to § 803(d) is limited to an hourly rate no greater than 150 percent of the hourly rate established for payment of court-appointed counsel.[1] *See* § 803(d) (codified at 42 U.S.C.A. § 1997e(d)(3)).

In successive orders, which were consolidated for this appeal,[2] the district court held that the PLRA, enacted on April

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[1] Plaintiffs do not dispute the State's computation that the maximum rate is $112.50 per hour under 42 U.S.C.A. § 1997e(d)(3) (West Supp. 1997). However, the State does not concede that Plaintiffs' counsel's hourly rate should automatically be set at the maximum rate for all attorneys involved. The district court, finding that the attorney's fees limitations of the PLRA were inapplicable to this case, awarded Plaintiffs' lead counsel $225.00 per hour and associate counsel $100.00 per hour. Paralegal services were compensated at an hourly rate of $65.00.

[2] We consolidated the State's appeal of the February 16, 1996, May 29, 1996, and August 30, 1996 orders (No. 96-1950) with its later appeal of the October 2, 1996 order (No. 96-2589). The February order does not award fees. The State's appeal of that order is limited to the district court's

26, 1996, did not apply to fee awards for work performed, but not compensated, prior to its enactment. As to fees for work performed subsequent to the PLRA's enactment, the district court held that the PLRA did not limit the fees generated in proving unconstitutional conditions at juvenile detention facilities, as opposed to adult facilities, because juvenile facilities were not covered by § 803(d) of the PLRA. For the reasons set forth herein, we disagree and hold that the attorney's fees limitations set forth in § 803(d) of the PLRA apply to juveniles confined to juvenile detention facilities. Moreover, the provisions apply to all awards of attorney's fee made after April 26, 1996, regardless of when the work was performed, if the plaintiff meets the new standards imposed by the PLRA for determining the appropriateness of an award of attorney's fees in a prison conditions lawsuit. Accordingly, the PLRA limits the fees available to Plaintiffs for proving unconstitutional conditions of confinement in juvenile facilities and for monitoring services ordered by the district court. Because the awards entered by the district court were determined under the pre-PLRA standards, we reverse and remand to the district court for a redetermination under the new standards.

I.

This appeal arises out of ongoing litigation between a group of incarcerated juveniles confined to four South Carolina juvenile detention facilities and the South Carolina Department of Juvenile Justice (the State). First, we review the procedural background of this case.

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conclusion that Plaintiffs achieved "prevailing party" status and therefore were eligible for fees related to a December 1995 hearing. The State challenges the amount of fees awarded in the May, August, and October orders for work related to the December 1995 hearing and subsequent monitoring services.

A.

In 1990, Plaintiffs filed the underlying class action pursuant to 42 U.S.C.A. § 1983 (West Supp. 1997) and three interrelated statutes -- the Individuals with Disabilities Education Act, *see* 20 U.S.C.A. §§ 1400-1485 (West 1990 & Supp. 1997); the Rehabilitation Act of 1973, *see* 29 U.S.C.A. §§ 701-96 (West 1985 & Supp. 1997); and the Americans with Disabilities Act, *see* 42 U.S.C.A. §§ 12101-12213 (West 1995 & Supp. 1997) -- challenging the conditions of confinement of juveniles housed in the Department of Juvenile Justice facilities operated by the State. Plaintiffs alleged that the State violated a number of their constitutional and federal statutory rights. After exhaustive discovery and a three-month bench trial, the district court concluded that certain aspects of confinement violated Plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment.[3] Plaintiffs, therefore, prevailed in proving that actual constitutional violations occurred in the juvenile facilities. In its order of January 25, 1995, the district court cited constitutional and statutory deficiencies in the areas of fire safety, food services, medical services, programming, overcrowding, and staffing levels. *See Alexander S. ex rel. Bowers v. Boyd*, 876 F. Supp. 773, 786-95 (D.S.C. 1995). The court also found that the Plaintiffs' constitutional rights had been infringed upon by the improper

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[3] The district court joined the First, Ninth, Tenth, and Eleventh Circuits in reviewing the conditions at state juvenile facilities under the standards of the Due Process Clause of the Fourteenth Amendment. *See Gary H. v. Hegstrom*, 831 F.2d 1430, 1431-32 (9th Cir. 1987); *H.C. ex rel. Hewett v. Jarrard*, 786 F.2d 1080, 1084-85 (11th Cir. 1986); *Santana v. Collazo*, 714 F.2d 1172, 1179 (1st Cir. 1983); *Milonas v. Williams*, 691 F.2d 931, 942 & n.10 (10th Cir. 1982). But *see Nelson ex rel. Nelson v. Heyne*, 491 F.2d 352, 355 (7th Cir. 1974) (applying the cruel and unusual punishment test of the Eighth Amendment). This issue was not appealed.

use of CS gas, a potent form of tear gas used for riot control, and by the State's failure to adequately identify those Plaintiffs who suffer from a "disability" for purposes of the facilities' educational programs. *See id.* at 785-88. Accordingly, the district court ordered the State to devise and implement a remedial plan to cure each violation. It also stated its intent to appoint a special master to monitor the implementation of the program. *See id.* at 803-05. The State did not appeal.

On November 22, 1995, after submissions and arguments, the district court issued an order awarding Plaintiffs attorney's fees for work relating to the January 1995 order. The State appealed the fee award, but argued only that the rates, hours, and documents submitted by Plaintiffs were inaccurate. In fact, during oral arguments before this court held two weeks after the effective date of the PLRA, the State specifically disavowed any claim that the PLRA limited the fee award.[4] Finding no error, we affirmed the award. *See Alexander S. ex rel. Bowers v. Boyd*, 89 F.3d 827 (4th Cir. 1996) (unpublished).

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[4] Specifically, the State was asked

> if it made any additional argument based on the recent amendments to the Civil Rights of the Institutionalized Persons Act, 42 U.S.C. § 1997 (1994). The State specifically disavowed any such claims. We note that it is not at all clear whether the 1996 amendments, which apply only to persons confined to a "jail, prison or other correctional facility" apply to juveniles confined in juvenile institutions, or even if they did whether they would apply retroactively. However, we need not reach that question here in view of the State's decision not to pursue any argument under the Act.

B.

On May 25, 1995, the State submitted its proposed remedial plan in accordance with the January 1995 district court order. The district court approved the plan, which provided, in pertinent part, for an increase in the facilities' security staff. The amount of the staffing increase was expressly dependent upon an anticipated reduction in the juvenile facilities' population.

On August 30, 1995, the district court held a status conference to assess the remedial plan's implementation progress. The court-appointed special master testified that the existing conditions "caused him to fear for the safety of the juveniles." (J.A. at 20.) At this conference, Plaintiffs made an oral motion to increase security staffing at the various juvenile facilities. Plaintiffs subsequently submitted in writing an Emergency Motion for Temporary Relief. Plaintiffs then filed a superseding Motion to Modify the Plan with regards to security staffing needs due to an increase, rather than the anticipated decrease, in the number of juveniles detained in the facilities.

In December 1995, the district court held a hearing on the Plaintiffs' motion to modify the remedial plan to increase staffing. During this hearing, the State agreed to revise its proposed plan. Following the December modification hearing, the district court issued an interim order on February 16, 1996, in which it found that the level of security staffing remained constitutionally inadequate and ordered the State to institute the revised plan presented during the modification hearing. The district court also found that Plaintiffs were the "prevailing party" on this issue and were entitled to reasonable attorney's fees pursuant to 42 U.S.C.A. § 1988 (West 1994 & Supp. 1997). In addition, the district court acknowledged Plaintiffs' future entitlement to attorney's fees for ongoing

monitoring activities and set up a procedure for the submission of fees.[5]

C.

Plaintiffs subsequently submitted separate motions for attorney's fees related to, among other things, the December modification hearing and subsequent monitoring activities. The State timely filed objections arguing that the "results obtained" in the December modification hearing did not justify the fee sought and that charges for secretarial services and work performed preparing a separate attorney's fee appeal and a December 1993 memorandum were improper. The State also submitted a supplemental memorandum, after the enactment of the PLRA, arguing that the limitations contained in § 803(d) of the PLRA applied to Plaintiffs' pending fee requests. After considering the State's various objections, the district court issued an order on May 29, 1996, awarding Plaintiffs attorney's fees for services performed by counsel from May

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[5] The district court stated that it would rely on previously filed affidavits regarding general attorney background information and billing rates, except as to any new attorneys, absent specific objection from the State. The district court then instructed:

> [The State] shall be allowed ten days after service of plaintiffs initial affidavits and billing documents to draw the court's attention to any perceived inadequacies in the form of plaintiffs' fee submission to the court. Plaintiffs shall be allowed ten days after the filing of [the State's] specification of inadequacy to supplement the previously filed documents. [The State] shall then be allowed the usual fifteen days after service of plaintiffs' supplementation to provide any objections to the content of plaintiffs' submission.

(J.A. at 30.)

1995 until February 1996, including the December 1995 modification hearing. The district court specifically concluded that it did not need to determine the applicability of the PLRA because the fees at issue were all incurred prior to the PLRA's enactment date.

Meanwhile, Plaintiffs continued to submit fee applications to the district court for monitoring work performed from February through July 1996. The State again timely filed objections to the fees, in which the State reiterated its position that the restrictions on attorney's fees set forth in § 803(d) of the PLRA applied to the Plaintiffs' fee applications. However, by order dated August 30, 1996, the district court awarded Plaintiffs additional fees for monitoring activities from February through July 1996 based on pre-PLRA standards. After conducting an in-depth analysis, the district court concluded that § 803(d) did not apply to Plaintiffs because the juveniles, while admittedly "prisoners" under the PLRA, were not "confined to a prison, jail, or other correctional facility" as that phrase is defined by 42 U.S.C.A. § 1997 (West 1994), a section left unaltered by the PLRA. And again, on October 2, 1996, the district court, over the State's objection that the PLRA limited the available fee award, awarded Plaintiffs attorney's fees based on pre-PLRA standards for monitoring performed in August 1996. We have consolidated the State's timely appeals of the orders of February 16, May 29, August 30, and October 2, 1996.

II.

On April 26, 1996, Congress enacted the PLRA, landmark legislation that, by imposing new restrictions on class action and individual prisoner lawsuits, sharply circumscribes a prisoner's ability to seek remedies for alleged unconstitutional prison conditions. To limit federal courts' involvement in the daily operation of federal and state correctional facilties, the PLRA made significant changes to

Titles 18, 28, and 42 of the United States Code. For the purposes of this appeal, we are concerned primarily with §§ 802 and 803 of the PLRA (codified at 18 U.S.C.A. § 3626 (West Supp. 1997) and 42 U.S.C.A. § 1997e (West Supp. 1997)).[6]

Prior to the PLRA, § 3626 of Title 18 was titled "Appropriate remedies with respect to prison crowding." Section 802 of the PLRA, however, amended the statute to provide the specific avenue through which prisoners may institute class actions to obtain prospective relief for prison conditions in general, not only for prison crowding. *See* 18 U.S.C.A. § 3626(a), and (g)(2) (setting forth the requirements for obtaining prospective relief in "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison"). In fact, Plaintiffs agreed at oral argument that the Plaintiffs' underlying § 1983 action, if initiated after April 26, 1996, properly would have

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[6] Although the present appeal focuses on the language of §§ 802 and 803 of the PLRA, the Act amended numerous sections of Titles 18, 28, and 42. Section 802 amended 18 U.S.C.A. § 3626 to narrow the relief available to prisoners claiming unconstitutional conditions of confinement. Section 803, in addition to completely revising 42 U.S.C.A. § 1997e, made technical revisions to 42 U.S.C.A. §§ 1997a, 1997b, and 1997c. Section 804 of the PLRA amended 28 U.S.C.A. § 1915 to require, among other things, prisoners proceeding in forma pauperis to pay a partial filing fee before filing a lawsuit or proceeding with an appeal, and § 805 created 28 U.S.C.A. § 1915a which requires district courts to dismiss any frivolous claims brought by a prisoner. Section 806 of the PLRA amended 28 U.S.C.A. § 1346 and now prohibits a convicted felon from bringing a civil action alleging mental or emotional injury while in custody without a prior showing of physical injury. Section 807 directs that any damages awarded to a "prisoner" in connection with a civil action brought against any "jail, prison or correctional facility" shall be used to satisfy any pending restitution orders against the prisoner, and § 808 provides that the victims of the crime for which the prisoner is incarcerated are to be notified of the pending payment of these damages.

been brought under § 802 of the PLRA, in addition to 42 U.S.C.A. § 1983 (West Supp. 1997).

Section 802 limits the remedies available in actions challenging conditions of confinement brought under any Federal law, as in this action, which was brought under 42 U.S.C.A. § 1983. Commonly known as the "Stop Turning Out Prisoners" (STOP) provisions, § 802 limits a federal court's ability to grant prospective relief. Specifically, § 802's provisions restrict preliminary injunctive relief, *see* 18 U.S.C.A. § 3626(a)(2); prohibit the imposition of population caps except as a last resort, *see* 18 U.S.C.A. § 3626(a)(3); allow for the immediate termination of prospective relief after a limited time, *see* 18 U.S.C.A. § 3626(b); restrict approval of consent decrees, *see* 18 U.S.C.A. § 3626(c); require prompt judicial decisions on motions to modify or terminate relief, *see* 18 U.S.C.A. § 3626(e); and limit the authority and payment of special masters, *see* 18 U.S.C.A. § 3626(f). Congress specifically made the STOP provisions of § 802 applicable to juvenile prisoners detained in juvenile detention facilities who challenge the conditions of their confinement in "any civil action with respect to prison conditions." 18 U.S.C.A. § 626(a)(1); *see also* 18 U.S.C.A. § 3626(g)(5) (defining prison to include "any Federal, State, or local facility that incarcerates or detains juveniles or adults").

In an attempt to stem the tide of frivolous lawsuits initiated by federal and state prisoners, Congress passed § 803 of the PLRA (codified at 42 U.S.C.A. § 1997e), which places new procedural restrictions on lawsuits "with respect to prison conditions" whether brought under § 1983 or any other Federal law by "a prisoner confined in any jail, prison, or other correctional facility." In addition to mandating administrative exhaustion, § 803 of the PLRA, entitled "Suits by prisoners," provides for the immediate dismissal of frivolous lawsuits, *see* 42 U.S.C.A. § 1997e(c); limits recovery for mental and emotional injuries, *see* 42 U.S.C.A. § 1997e(e); limits the removal of a prisoner from confinement during pretrial

proceedings, see 42 U.S.C.A. § 1997e(f); allows the waiver of the right to reply to prisoner lawsuits, *see* 42 U.S.C.A. § 1997e(g); and, as is pertinent to this action, restricts the availability and amount of attorney's fees recoverable by prisoners under 42 U.S.C.A. § 1988, *see* 42 U.S.C.A. § 1997e(d).

III.

This appeal presents three issues. First, are the PLRA's limitations on attorney's fees applicable to juveniles incarcerated in juvenile facilities? Second, if applicable to juveniles, are the limitations applicable to fee awards for work performed, but not compensated, prior to the enactment of the PLRA? And third, do the PLRA's limitations on attorneys' fees impose new standards for determining the appropriateness of a fee award in a prison conditions suit? We address these issues in turn. Although we generally review a district court's award of attorney's fees for an abuse of discretion, *see Plyler v. Evatt*, 902 F.2d 273, 277-78 (4th Cir. 1990), we review the applicability of statutory amendments de novo, *see United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994) ("Interpreting a statute is a legal issue that successive courts freely review, and hence our review is plenary.").

A.

The State contends that the PLRA's limitations on attorney's fees apply to the district court's award of attorney's fees to the Plaintiffs arising from the Plaintiffs' successful § 1983 action alleging unconstitutional conditions of confinement in South Carolina's juvenile facilities. Section 1988 provides that "[i]n any action or proceeding to enforce a provision of section[ ] . . . 1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee."

42 U.S.C.A. § 1988(b) (West Supp. 1997). Therefore, § 1988 is the statutory mechanism under which Plaintiffs sought attorney's fees before the district court. Section 803 of the PLRA, however, limits the district court's ability to award attorney's fees in lawsuits brought on behalf of "a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988." § 803(d) (codified at 42 U.S.C.A. § 1997e(d)(1)). Whether the State is correct in arguing that these limitations apply to the attorney's fees awarded in the May, August, and October orders depends on whether juveniles detained in the State's juvenile facilities are "prisoners" confined to a "jail, prison, or other correctional facility."

It is undisputed that the term "prisoner" in § 803(d) of the PLRA encompasses incarcerated juveniles. Section 803(d) provides that "the term `prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." § 803(d) (codified at 42 U.S.C.A. § 1997e(h)). "Prisoner" is similarly defined in § 802 of the PLRA.[7] Therefore, resolution of whether Plaintiffs attorney's fees may be limited turns on whether Congress intended the phrase "jail, prison, or other correctional facility" to include juvenile detention facilities when it enacted the PLRA.

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[7] Specifically, § 802(a) (codified at 18 U.S.C.A. § 3626(g) (West Supp. 1997)), defines prisoner as "any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program."

1.

Section 803 of the PLRA does not expressly define the phrase "jail, prison, or correctional facility." However, § 802 of the PLRA, which sets forth the procedures through which a class of prisoners such as Plaintiffs may contest constitutional violations pertaining to prison conditions, defines "prison" as "any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law." § 802(a) (codified at 18 U.S.C.A. § 3626(g)(5)). Accordingly, the State contends that because Congress, when enacting the PLRA, intended prisons to include juvenile facilities for the purpose of stating a cause of action under § 802, this court should construe prisons to include juvenile facilities for the purpose of awarding attorney's fees under § 803(d).

Plaintiffs, however, present four arguments in support of their position that the attorney's fees limitations set forth in § 803(d) are inapplicable to this case. First, relying on the definition of "institution" found in 42 U.S.C.A. § 1997 (West 1994), Plaintiffs contend that Congress did not intend § 803(d) of the PLRA to apply to juvenile facilities. Section 1997, the definitional section applicable to 42 U.S.C.A. § 1997e (the statutory provision containing the attorney's fees limitations of the PLRA), was left unrevised by the PLRA. It defines "institution" as any facility or institution owned and operated by the State which is

> (i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;
>
> (ii) a jail, prison, or other correctional facility;
>
> (iii) a pretrial detention facility;

(iv) for juveniles --

(I) held awaiting trial;

(II) residing for any State purpose in such facility or institution (other than a residential facility providing only elementary or secondary education that is not an institution in which reside juveniles who are adjudicated delinquent, in need of supervision, neglected, placed in State custody, mentally ill or disabled, mentally retarded, or chronically ill or handicapped); or

(v) providing skilled nursing, intermediate or long-term care, or custodial or residential care.

42 U.S.C.A. § 1997(1). In defining "institution," § 1997 differentiates between a "jail, prison, or other correctional facility" and facilities for juveniles, like the ones that are the subject of this action. Therefore, as Plaintiffs argue, one could conclude by negative implication that since the PLRA attorney's fee limitations in § 803(d) of the Act (codified at 42 U.S.C.A. § 1997e), apply only to prisoners confined to a "jail, prison, or other correctional facility," and since 42 U.S.C.A. § 1997(1) distinguishes between a "jail, prison, or other correctional facility" and a juvenile facility, the PLRA's limitations on attorney's fees do not apply to juvenile Plaintiffs. Plaintiffs argue that if Congress had intended for the all-encompassing definition of "prison" in § 802 to apply to the attorney's fees limitations in § 803, it would have modified the definition of "institution" in § 1997 to omit the three separate categories of facilities and to keep the terminology in Title 42 consistent. *See United States v. Langley*, 62 F.3d 602 (4th Cir. 1995) ("[I]t is proper to consider that Congress acts

with knowledge of existing law, and that absent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction." (quotations omitted)), *cert. denied*, 116 S. Ct. 797 (1996). Therefore, Plaintiffs urge this court to adopt the more limited definition of "jail, prison, or other correctional facilities" found in § 1997, which, by implication, does not include juvenile facilities.

Second, Plaintiffs rely upon the fact that, while both §§ 802 and 803 of the PLRA contain definitions of "prisoner," which includes juveniles, Congress defined "prison" to include juvenile facilities only in § 802. The district court agreed, reasoning that this omission was intentional, "[g]iven the ease with which the[§ 802] definition could have been included in [§ 803]." (J.A. at 71.)

Third, Plaintiffs cite Congress's historically different treatment of adult and juvenile prisoners. Again, the district court agreed, relying on (1) the distinct difference between the ability of juveniles and adults to protect their own interests; (2) the probability that juveniles' rights will be pursued only in class actions which require a higher level of legal skill and long-term commitment of counsel; and (3) that the clear distinction made between juvenile facilities and adult prisons in 42 U.S.C.A. §§ 1997 and 1997a (West 1994) was left unchanged by the PLRA.[8] Because Congress did not amend these provisions, the district court reasoned that Congress intended to maintain the distinction between juvenile facilities and adult prisons.

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[8] Under 42 U.S.C.A. § 1997a (West 1994), the Attorney General has the authority to institute a civil action on behalf of a person residing in or confined to an "institution," as defined by 42 U.S.C.A. § 1997 (West 1994), seeking relief for violations of statutory or constitutional rights. However, § 1997a specifically limits the Attorney General's authority to bring actions on behalf of a person confined to a "jail, prison, or other correctional facility" to constitutional violations only.

Finally, Plaintiffs rationalize the apparent inconsistency of defining a juvenile not incarcerated in a "prison" as a "prisoner." The district court reconciled the definitions by concluding that "[t]his would simply place juveniles who have been transferred to adult facilities on the same footing as other adult prisoners." (J.A. at 72.) Therefore, according to the district court, all inmates in adult prisons are subject to the same rules, regardless of age.

2.

In a case that turns on statutory construction, we begin by examining the literal and plain language of the statute. *See Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 846 (1997); *Williams v. U.S. Merit Sys. Protection Bd.*, 15 F.3d 46, 49 (4th Cir. 1994). If the "statutory language is unambiguous and the statutory scheme is coherent and consistent," our inquiry ends. *Robinson*, 117 S. Ct. at 846 (quotation omitted); *Murphy*, 35 F.3d at 145. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 117 S. Ct. at 846 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992)). In interpreting statutory language, words are generally given their common and ordinary meaning. *See Murphy*, 35 F.3d at 145.

Although Congress did not define the phrase "jail, prison, or other correctional facility" in § 803 of the PLRA, the plain meaning of the phrase undoubtedly encompasses juvenile detention facilities. "Jail" is commonly defined as a "place for the lawful confinement of persons" or a "prison." *Webster's II New Riverside University Dictionary* 650 (1988). It is also defined as a "prison" or a place "usually used to hold persons either convicted of misdemeanors (minor crimes) or persons awaiting trial or as a lockup for intoxicated and disorderly persons." *Black's Law Dictionary* 834 (6th ed.

1990). "Correctional institution" is a "generic term describing prisons, jails, reformatories and other places of correction and detention." *Id.* at 344. And, "house of correction" is defined as a "prison for the reformation of petty or juvenile offenders." *Id.* Congress did not add any language limiting the scope of these words to adult facilities. Rather, Congress prefaced the phrase with the word "any." In a similar context, the Supreme Court has noted that "the word `any' has an expansive meaning." *United States v. Gonzales*, 117 S. Ct. 1032, 1035 (1997) (defining "any" as "one or some indiscriminately of whatever kind" (citation omitted)). Therefore, we must construe the phrase to include *all* jails, prisons, and correctional facilities, including those housing juveniles. *See id.* (construing the statutory phrase "any other term of imprisonment" as referring to "all terms of imprisonment"). Further, the language "or other correctional facility," is broad and inclusive, rather than exclusive. Therefore, the plain meaning of the statutory language suggests that juvenile detention facilities should be included within the scope of the phrase "jail, prison, or other correctional facility."

We acknowledge that Congress placed the attorney's fees limitations provision, applicable to prisoners confined to "jail, prison, or other correctional facility," into Title 42, and that § 1997 of Title 42 distinguishes between a "jail, prison, or other correctional facility" and facilities housing juveniles. Therefore, we address the apparent conflict. Because, however, the PLRA's definition of "prison" (which includes juvenile facilities) is inconsistent § 1997's implicit definition of "jail, prison, or other correctional facility" (which excludes juvenile facilities), we conclude that the phrase is ambiguous. *Cf. Robinson*, 117 S. Ct. at 847 (holding that the term "employee" standing alone is ambiguous in Title VII because some sections of Title VII define the term to include former employees, while other sections do not).

Having determined that the phrase at issue is ambiguous, we apply the traditional tools of statutory

construction. *Id.* at 848. In doing so, "[w]e begin with the premise that all parts of the statute must be read together, neither taking specific words out of context, nor interpreting one part so as to render another meaningless." *United States v. Snider*, 502 F.2d 645, 652 (4th Cir. 1974) (citations omitted). A cardinal rule of statutory construction is that statutes which are originally part of the same Act should be construed together. *Cf. Robinson*, 117 S. Ct. at 849 (interpreting ambiguous statutory term so as to be "more consistent with the broad context of [the Act] and the primary purpose of the [section at issue]"); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995) ("[W]e begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs."); *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) ("Statutory construction is a holistic endeavor and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." (quotation and citation omitted)). More specifically, identical terms within an Act should be given the same meaning. *See Estate of Cowart*, 505 U.S. at 479 (1992); *Director v. Newport*, 8 F.3d 175, 184 n.8 (4th Cir. 1993). In other words, we must define § 803(d)'s "jail, prison, or other correctional facility" phrase so that it harmonizes with the other provisions of the PLRA, promotes the goals of the PLRA, and gives each provision purpose.

Section 802 of the PLRA defines the term "prison" as any facility that "detains juveniles or adults accused of, convicted of, sentenced for, [or] adjudicated delinquent for" violating criminal law. § 802(a) (codified at 18 U.S.C.A. § 3626(g)(5)). Given this, and the fact that § 803(d) includes an incarcerated juvenile within its definition of "prisoner", we conclude that the phrase "jail, prison, or other correctional facility" found in § 803(d) of the PLRA (codified at 42

U.S.C.A. § 1997e) must include juvenile facilities such as the ones that are the subject of this action. This construction of the statute makes the PLRA internally consistent and best furthers Congress's intentions.

In enacting the PLRA, Congress had far-reaching goals, and nothing in the Act indicates an intent to omit juveniles confined in juvenile facilities from its impact. To the contrary, by enacting § 803 of the PLRA, Congress affirmatively amended 42 U.S.C.A. § 1997e to replace the word "adult" with the word "prisoner," and then defined "prisoner" to expressly include juveniles adjudicated delinquent of crimes. In addition, § 809(a) of the PLRA (codified at 28 U.S.C.A. § 1932 (West Supp. 1997)) specifically limits the revocation of earned release credit to "adult[s] convicted of a crime and confined in a Federal correctional facility" if the district court concludes that they filed a civil claim for a malicious purpose, solely to harass the party against which it was filed, or if the claimant presents false evidence to the court. It would be unnecessary to expressly limit § 809 to adults if the term "correctional facility" only applied to detention facilities housing adults. A comparison of these two sections of the PLRA demonstrates that Congress recognized the difference between juveniles and adults when enacting the PLRA, and intended to impose the new provisions of § 803 of the Act (codified at 42 U.S.C.A. § 1997e), including the restrictions on attorney's fees found in subsection (d), on all "prisoners," including juvenile prisoners.

Furthermore, Plaintiffs concede that § 802 of the PLRA (codified at 18 U.S.C.A. § 3626) limits the remedies available to juveniles confined in juvenile facilities in prison conditions lawsuits. We can discern no reason for Congress to limit the more important substantive remedies available to juveniles under § 802 of the PLRA, yet not limit the availability of attorney's fees under § 803. The purpose of the attorney's fees provision is to encourage private attorneys to represent plaintiffs bringing meritorious lawsuits to expose

unconstitutional prison conditions. The limitations placed on fee awards by § 803 do not undermine this purpose. If private attorneys find that fee limitations hinder their ability effectively to litigate these cases, 42 U.S.C.A. § 1997a (West 1994 & Supp. 1997), left intact by the PLRA, authorizes the Attorney General to institute actions on behalf of persons residing in or confined to a jail, prison, or other correctional facility if the Attorney General has reasonable cause to believe that such persons are being subjected to unconstitutional conditions of confinement. *See* 42 U.S.C.A. § 1997a(a).

Moreover, we are not persuaded by Plaintiffs' argument that Congress intended the definition of "prisoner" in § 803 to include juveniles only when they are confined to adult prisons. This construction does not harmonize the provisions of the PLRA. The Juvenile Prosecution Act of 1994 prohibits the placement of juveniles in adult federal facilities. *See* 18 U.S.C.A. § 5039 (West Supp. 1997) ("No juvenile committed, whether pursuant to an adjudication of delinquency or conviction for an offense, to the custody of the Attorney General may be placed or retained in an adult jail or correctional institution. . . ."). Also, a juvenile who is simply "accused of" a crime or even "adjudicated delinquent" would not, under normal circumstances, be confined to an adult state facility. Therefore, to adopt Plaintiffs' reasoning would render the "accused of" and "adjudicated delinquent" language in the definition of "prisoner" superfluous. Therefore, while we recognize the apparent conflict with the definition of "institution" found in 42 U.S.C.A. § 1997, we hold that a limitation of the phrase "jail, prison, or other correctional facility" to adult prison facilities in § 803 of the PLRA would be inconsistent with other language within the section, other sections of the Act, and the plain and usual meanings of the relevant terms. As a result, we conclude that Plaintiffs are subject to the attorney's fees limitations of the PLRA because they are "prisoner[s] . . . confined to any jail, prison, or other

correctional facility." § 803(d) (codified at 42 U.S.C.A § 1997e(d)).

B.

Having determined that the PLRA's limitations on attorney's fees apply to Plaintiffs, we next address the applicability of the provisions to the fees awarded in the May and August orders for services performed by Plaintiffs' counsel prior to the enactment of the PLRA.

1.

Plaintiffs argue that the State waived application of the provisions to work performed prior to the enactment of the PLRA during oral arguments before this court on May 6, 1996. At that time, the State was appealing a November 22, 1995 order in which the district court awarded Plaintiffs attorneys' fees for work related to this ongoing litigation. As previously noted, *see supra* n.4, in response to inquiry during oral argument as to whether the State had any argument based on the attorney's fees provisions contained in the recently enacted PLRA, the State "specifically disavowed any such claims." *Alexander S. ex rel. Bowers v. Boyd*, 89 F.3d 827 (4th Cir. 1996) (unpublished).

We do not consider the State's waiver of application of the PLRA's attorney's fees provision to the November 1995 order to be a waiver of the statute's applicability to all future awards based on work completed prior to April 26, 1996. The November order is a separate order, independent of the February, May, August, and October orders currently being appealed. To restrict the State's arguments in this appeal to those argued in a previous appeal is obviously impermissible. Furthermore, because the parties have not, prior to this appeal, litigated the applicability of the PLRA's attorney's fees limitations before this Court, we are not bound by res judicata.

The State timely raised the statute's applicability for the district court's consideration prior to the issuance of the May order. In its memorandum, the State argued that the restrictions of § 803(d) (codified at 42 U.S.C.A. § 1997e(d)) applied to Plaintiffs' pending fee applications for work performed from May 1995 until February 1996. The State reiterated this position in later memorandums filed in objection to Plaintiffs' subsequent fee applications. As a result, we conclude that the State preserved the issue of the amendments' application to all awards made by the district court subsequent to the enactment of the PLRA.

2.

Section 803(d) of the PLRA provides that "[n]o *award* of attorney's fees" ordered in an action brought by a prisoner claiming unconstitutional conditions of confinement "shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel." § 803(d) (codified at 42 U.S.C.A. § 1997e(d)(3)) (emphasis added). The plain language of the statute mandates that all attorney's fees awarded after April 26, 1996, in any prison conditions lawsuit comply with the restrictions imposed by the PLRA.[9] *See Williams v. U.S. Merit Sys. Protection Bd.*, 15 F.3d 46, 49 (4th Cir. 1994) (stating that "[s]tatutory construction begins with an

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[9] While we are specifically analyzing the language codified at 42 U.S.C.A. § 1997e(d)(3) in this section to determine its applicability to fees incurred prior to, but awarded subsequent to the enactment of the PLRA, the same analysis applies to the fee restrictions contained in subsections (d)(1) (heightening eligibility requirements for attorney's fees) and (d)(2) (limiting fees available when a monetary judgment is awarded). Both § 1997e(d)(1), discussed at III.C.2., and (d)(2), which is inapplicable to this case, expressly apply to all fee awards made subsequent to the enactment of the PLRA.

examination of the literal language of the statute" (quotations omitted)). There is, quite simply, no award until an order is issued, and all of the orders appealed were entered after the statute's enactment.[10] Congress could have easily inserted language to restrict the application of these limitations to awards for work performed subsequent to the PLRA's enactment, but it did not do so. Accordingly, the plain language of § 803(d) of the PLRA (codified at 42 U.S.C.A. § 1997e(d)) mandates that the attorney's fees limitations apply to the awards made in the May, August, and October orders, regardless of when the work being compensated was performed.

We acknowledge that other courts that have addressed the applicability of the attorney's fees provisions of § 803 of the PLRA to pending cases have refused to apply the limitations, concluding that such application would have an

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[10] The Dissent argues that "the 'award' of attorney's fees occurred on February 16, 1996 when the court set out its instructions regarding how further [monitoring] fees would [be] paid." Dissenting Op. at 62. We disagree. While the district court recognized that Plaintiffs were "entitled" to attorney's fees for future monitoring activity in the February 16 order, it did not award fees. Rather, its limited ruling on this issue was a finding that it was "appropriate . . . for plaintiffs' counsel to play some role in this monitoring process" and to be compensated. The district court stated that its decision to "consider fee applications for monitoring activity [was] not . . . prior approval of any fee request." (J.A. at 29.) As the Dissent concedes, the district court had yet to determine "at what rate and for how many hours" counsel was to be compensated. Dissenting Op. at 62. To conclude, as the Dissent does, that the district court awarded Plaintiffs attorney's fees on February 16 for all future monitoring activity, without assessing the reasonableness of such fees, is to condone pure speculation and arbitrariness by the district court. We decline to interpret the district court's order in such a way. Moreover, to adopt the Dissent's rationale would require us to find the PLRA's fee restrictions inapplicable to all attorney's fees awarded in this case for monitoring activity related to the implementation of the remedial plan, even when the monitoring occurred subsequent to April 26, 1996. Even the Dissent does not propose this result.

impermissible retroactive effect. *See Jensen v. Clarke*, 94 F.3d 1191, 1201-1203 (8th Cir. 1996) (concluding that application of the attorney's fees provisions in § 803(d) to Plaintiffs and their attorneys who had worked for "literally years" on the assumption that their fees would be based on 42 U.S.C.A. § 1988 would be "manifestly unjust"); *Cooper v. Casey*, 97 F.3d 914, 921 (7th Cir. 1996) (same); *see also Weaver v. Clarke*, 933 F. Supp. 831, 834 (D. Neb. 1996) (refusing to apply § 803(d)'s limitations when determining attorney's fees awarded after the enactment of the PLRA for work performed prior to the enactment of the PLRA). But *cf. Hadix v. Johnson*, 947 F. Supp. 1113, 1114-1115 (E.D. Mich. 1996) (concluding that § 803 of the PLRA applies when determining attorney fee awards for work completed after enactment of the PLRA in a prison conditions case arising prior to enactment of the PLRA). With all due respect to our sister Circuits, we find their analyses flawed.[11]

In *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483 (1994), the Supreme Court outlined a three-step inquiry to be

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[11] Contrary to the Dissent's assertion that we are creating a circuit split as to the retroactive application of the PLRA's attorney's fees restrictions, Plaintiffs' case is distinguishable from both *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996), and *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996), in one key aspect -- the district court made the attorney's fee awards in both *Jensen* and *Cooper* prior to the enactment of the PLRA. Therefore, the attorney's fees limitations of § 803 were inapplicable to the awards based on the plain language of the statute regardless of any possible retroactivity problems. Nevertheless, the courts conducted a retroactivity analysis and both courts concluded that applying the fee limitations to pending cases would be "manifestly unjust" because, as the Eighth Circuit lamented, Plaintiffs and their attorneys "have litigated for literally years under . . . the assumption that Section 1988 would apply to this case." *Jensen v. Clarke*, 94 F.3d 1191, 1203 (8th Cir. 1996). "If we apply the Act, those expectations will be foiled. Thus, application of the Act in this case would have the retroactive effect of disappointing reasonable reliance on prior law." *Id.* at 1202.

undertaken when determining whether a court should apply a new statute to actions that occurred prior to the enactment of the statute. See id. at 1505. First, we ascertain whether Congress expressly prescribed the reach of the statute. Although we are bound by Congress's directive, *see id.*, nothing in § 803 of the PLRA expressly prescribes its reach. Unlike § 802, which Congress expressly made applicable to pending cases, § 803 contains no stated effective date. We decline to draw any negative inferences from the express inclusion of a provision making § 802 applicable to pending cases and the absence of the same from § 803. *Cf. id.* at 1494 (rejecting argument that "because Congress provided specifically for prospectivity in two places . . . we should infer that it intended the opposite for the remainder of the statute").

Absent an express directive from Congress, we must apply a newly enacted statute to pending cases unless doing so would give the statute "retroactive effect." *Id.* at 1503 ("`[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.'" (quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974))). If application of the new statute would have retroactive effect, then "our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." Id. at 1505. However, "[a] statute does not operate `retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Id.* at 1499 (citation omitted); *see also id.* at 1498 ("[T]he potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope."). Rather, the Supreme Court has instructed us that application of a new statute to a pending case has a retroactive effect only when "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new

duties with respect to transactions already completed."[12] *Id.* at 1505. In other words, the court must determine "whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 1499.

In *Landgraf,* the Supreme Court recognized several types of statutes that, even though enacted after the events giving rise to the underlying lawsuit, could be applied to pending cases without having a retroactive effect. For example, the Court noted that application of a new statute that affects only secondary, rather than primary, conduct does not give rise to concerns about retroactivity.[13] *See id.* at 1502. The Court then specifically cited attorney's fee determinations as an example of secondary conduct that "[does] not resemble the cases in which we have invoked the presumption against statutory retroactivity." *Id.* at 1503; *see also id.* ("Attorney's fee determinations . . . are `collateral to the main cause of action' and `uniquely separable from the cause of action to be proved at trial.'" (quoting *White v. New Hampshire Dep't of Employment Sec.,* 455 U.S. 445, 451-52 (1982))).

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[12] While application of the PLRA's fee limitations may upset the expectations of Plaintiffs' counsel, it cannot be said that the imposition of the restrictions directly affects the Plaintiffs. Therefore, because a statute has a retroactive effect under *Landgraf* only when it negatively impacts a *party's* expectations or rights, statutory restrictions as to the amount and availability of attorney's fees will not generally raise retroactivity problems. *See Landgraf v. USI Film Prods.,* 114 S. Ct. 1483, 1503 (1994).

[13] In *Landgraf,* the Court noted several additional examples of new statutes whose application to pending cases was proper. These included statutes whose plain language unambiguously requires application to pending cases, *see United States v. Schooner Peggy,* 1 Cranch 103, 5 U.S. 103 (1801); statutes authorizing or affecting the propriety of prospective relief, *see American Steel Foundries v. Tri-City Central Trades Council,* 257 U.S. 184 (1921); statutes conferring or ousting jurisdiction, *see Bruner v. United States,* 343 U.S. 112 (1952); and statutes revising procedural rules, *see Collins v. Youngblood,* 497 U.S. 37 (1990). *See Landgraf v. USI Film Prods.,* 114 S. Ct. 1483, 1501-1502 (1994) (collecting cases).

We conclude, therefore, that application of the PLRA's fee limitations to the awards made in the district court's May and August orders does not have an impermissible retroactive effect because the determination of attorney's fees awards, which are collateral to the main cause of action, does not attach new legal consequences to completed events. Moreover, the modifications made by § 803 of the PLRA to a plaintiff's entitlement to attorney's fees are not so fundamentally unfair as to result in manifest injustice. *Cf. Farrar v. Hobby*, 506 U.S. 103, 115 (1992) (instructing that § 1988 was "never intended to produce windfalls to attorneys" (quotation omitted)); *see also id.* at 122 (stating that § 1988 "is not a relief Act for lawyers" (quotation omitted) (O'Connor, J., concurring)). As a result, the district court erred when it failed to apply the law in effect at the time it entered its May and August orders.

C.

Finally, we address the new standards imposed by the PLRA for determining a fee award in a prison conditions suit. Section 803(d) of the PLRA requires the district court to conduct a three-step analysis when reviewing attorney's fees requests. First, the court must be satisfied that the plaintiff is eligible for fees under 42 U.S.C.A. § 1988. Prior to the enactment of the PLRA, a plaintiff in a prison conditions lawsuit obtained attorney's fees solely through 42 U.S.C.A. § 1988. Section 1988 allows the district court to award reasonable attorney's fees to a prevailing party "[i]n any action or proceeding to enforce a provision of section[ ] . . . 1983." 42 U.S.C.A. § 1988(b). "[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement." *Farrar,* 506 U.S. at 111 (citation omitted); *accord S-1 and S-2*

v. State Bd. of Ed., 21 F.3d 49, 51 (4th Cir. 1994) (en banc). Moreover, the fee request must be "reasonable." This Court has articulated twelve factors which the district court should consider when determining the reasonableness of an attorney's fee request. *See Barber v. Kimbrell's Inc.*, 577 F.2d 216 (4th Cir. 1978). Second, § 803(d) of the PLRA requires the plaintiff to prove that "the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights . . . and . . . is proportionately related to the court ordered relief . . . or . . . was directly and reasonably incurred in enforcing the relief ordered" before fees can be awarded. § 803(d) (codified at 42 U.S.C.A. § 1997e(d)(1)). And finally, § 803(d) of the PLRA imposes a cap on the hourly rate available to a plaintiff's counsel of 150 percent of the hourly rate available to court-appointed counsel. *See* § 803(d) (codified at 42 U.S.C.A. § 1997e(d)(3)). Therefore, the district court must compute the maximum hourly rate allowable and determine whether a plaintiff's counsel is entitled to the maximum rate or a reduced amount.[14]

1.

The State challenges the district court's finding that Plaintiffs were eligible for fees pursuant to 42 U.S.C.A. § 1988 on two grounds. First, the State contends that the district court erred when it awarded Plaintiffs attorney's fees for work relating to the December modification hearing because, they argue, Plaintiffs were not the "prevailing party" in that proceeding. Second, the State argues that the district court

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[14] The district court ruled that if it had applied the fee limitations of § 803(d), it would have awarded counsel for Plaintiffs the maximum hourly rate available. We express no opinion as to the appropriateness of such an award. The district court may, of course, reconsider the award on remand.

abused its discretion when it failed to expressly consider all the *Barber* factors when evaluating the "reasonableness" of Plaintiffs' fee requests. We address the State's arguments in turn.

a.

The State argues that Plaintiffs failed to prove their initial eligibility for fees under 42 U.S.C.A. § 1988 for work relating to the December staffing hearing and modification motion. The State contests Plaintiffs' status as prevailing party in the resulting February order because (1) the order was only an "interim," rather than a final order, and (2) the State consented to the revised plan, rendering the Plaintiffs' motion nothing more than a "catalyst" for the modification. We disagree and hold that the district court properly determined that Plaintiffs were the "prevailing party" in the February order and, therefore, were eligible for fees under 42 U.S.C.A. § 1988.

Part of the remedial plan initially proposed by the State included an increase in the number of security staff to provide minimal levels of physical safety for the juveniles housed in the State's juvenile facilities. The proposed plan, in addition to increasing staff, included a population reduction of 100 juveniles by July 15, 1996, and 200 juveniles by July 15, 1997. During the June 1994 trial, the juvenile population ranged from 670 to 730 at institutions that had a rated capacity of 299. By July 13, 1995, however, the juvenile population had risen to 851, rather than declining. As a result, Plaintiffs moved for emergency relief, requesting additional staffing. Also, at the August 1995 status conference, the special master appointed to monitor the State's compliance with the plan lamented that the facilities remained unsafe and that an emergency situation existed.

In response, the State asked the district court to grant it time to implement the original remedial plan. The State also

argued that had been no change in circumstances warranting the relief sought by Plaintiffs. Plaintiffs nevertheless moved for a modification of the remedial plan based on the unexpected increase in the juvenile population. Plaintiffs argued that the modification was necessary because the State's original plan was predicated upon a reduction in population.

During the subsequent three-day hearing in December 1995, Plaintiffs presented testimony from several juvenile witnesses, Department of Juvenile Justice employees, and two experts. At the time of the hearing, the juvenile population had increased to approximately 1000. Nevertheless, at the beginning of the hearing the State maintained there had been no change in conditions at the juvenile facilities and that the modifications requested by Plaintiffs were premature and unnecessary. However, at the completion of Plaintiffs' case, the State conceded the need for additional security staffing and proposed its revised remedial plan. The State also conceded that it had begun increasing personnel shortly before the December hearing, and that it planned additional increases due to the rise in the juvenile population.

The district court issued an order on February 16, 1996, requiring the State to increase staffing to "*at least* that level of staffing set forth in [the State's revised] plan." (J.A. at 24.) The court further found that the order was "only interim and [was] subject to further modification after an appropriate amount of time has passed to allow evaluation of [the State's] modified staffing plan." (J.A. at 24.) The district court specifically concluded that Plaintiffs were the prevailing party in the December action and provided for the submission of affidavits for an award of attorney's fees for the staffing issue and monitoring activities since the January 1995 order.

The State contends that Plaintiffs were not a prevailing party, but merely a catalyst which encouraged the State to adopt an increased staffing plan. This Court has clearly rejected the "catalyst theory" as a means of acquiring prevailing party status for the purposes of 42 U.S.C.A. § 1988.

See Arvinger v. Mayor and City Council of Baltimore, 31 F.3d 196, 198 (4th Cir. 1994) (citing *S-1 & S-2 v. State Bd. of Ed., 21 F.3d 49, 51 (4th Cir. 1994) (en banc)). To acquire* prevailing party status, Plaintiffs must "succeed on[a] significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *Arvinger*, 31 F.3d at 200 (quotation omitted). Moreover, "[t]he plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought or comparable relief through a consent decree or settlement." *Farrar*, 506 U.S. at 111. "In short, a plaintiff `prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111-12. The February 16 order was an enforceable order against the State requiring it to increase security staffing levels at the juvenile facilities pursuant to a modified plan. Thus, it materially altered the "legal relationship" between Plaintiffs and the State. *See id.* at 113 ("No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant.").

Under these circumstances, the fact that the new plan was "voluntarily" proposed by the State rather than the court is irrelevant. Plaintiffs moved for a modification of the State's original remedial plan. The State opposed Plaintiffs' motions, arguing that their original plan should be given time to work. It was not until the conclusion of Plaintiffs' presentation at the December hearing, during which the State attempted to discredit many of Plaintiffs' witnesses, that the State conceded that increased staffing was necessary to protect the juveniles housed in the State's juvenile facilities. Furthermore, while the State implemented some of the ordered changes prior to the hearing, many were not instituted until afterwards, in accordance with the district court's order. As a result of Plaintiffs' motions and the subsequent hearing, the district

court ordered the State to modify its original remedial plan to provide for increased staffing at the levels proposed by the State during the hearing. This order memorialized the "resolution of [a] dispute which change[d] the legal relationship between [the State] and [Plaintiffs]." *Farrar*, 516 U.S. at 111. Accordingly, the district court did not err in concluding that Plaintiffs were the prevailing parties in the December modification hearing. *See S-1 and S-2 v. State Bd. of Ed.*, 6 F.3d 160, 171 (4th Cir. 1993) (Wilkinson, C.J., dissenting) ("[A] voluntary change in conduct[,] formalized in a legally enforceable settlement agreement[, will] transform a plaintiff into a prevailing party for purposes of § 1988."), *adopted as majority opinion*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc).

b.

The State also challenges the awards of attorney's fees in the February 16, May 29, and August 30, orders, arguing that the district court abused its discretion when it failed to expressly consider all the factors articulated in *Barber v. Kimbrell's Inc.*, 577 F.2d 216 (4th Cir. 1978). "It is well settled that district courts have considerable discretion in awarding attorneys' fees, and we must not overturn an award by the district court unless it is clearly wrong." *Colonial Williamsburg Foundation v. Kittinger Co.*, 38 F.3d 133, 138 (4th Cir. 1994) (citation omitted).

We have enunciated twelve factors that the district court must consider when determining the reasonableness of an attorney fee request. *See Barber*, 577 F.2d at 226 n.28.[15]

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[15] The *Barber* factors include:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant

We have also held that any award of attorney's fees must be accompanied by detailed findings of fact with regard to the factors. *See id.* at 226. With that having been said, we conclude that the State forfeited any error made by the district court in failing to expressly address the *Barber* factors in each of the appealed orders. In its February 16 order, the district court set forth its "Fee application procedures" for counsel. It instructed both parties as follows:

> The court will not require plaintiffs to file affidavits which duplicate the general attorney background information and billing rates filed in support of the prior fee application except as to any new attorneys or attorneys for whom plaintiffs are now claiming a different billing rate. The court will rely on the affidavits previously filed in this matter absent *specific objection* from defendants.

> litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between the attorney and client; and (12) attorneys' fees awards in similar cases.

See Barber v. Kimbrell's, Inc., 577 F.2d 216, 226 n.28 (4th Cir. 1978) (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)).

(J.A. at 30 (emphasis added).)[16] The district court further provided that after Plaintiffs' counsel submitted fee affidavits, the State had ten days to "draw the court's attention to any perceived inadequacies in the form of Plaintiffs' fee submission to the court." (J.A. at 30.) Plaintiffs then had an opportunity to respond, after which the State had fifteen additional days to object to the submission of fees. The State, however, neither objected to the fees on the basis of any of the *Barber* factors nor objected to the district court's failure to expressly address the *Barber* factors.

Nevertheless, we may correct a forfeited error. *See United States v. Olano*, 113 S. Ct. 1770, 1777 (1993). A review of the record, however, reveals that the district court did not err. To the contrary, there is ample evidence demonstrating that the district court carefully reviewed the fee applications and determined their reasonableness. As noted, the district court set forth a specific procedure for attorney's fee applications such that the State had ample opportunity to object to any submissions by the Plaintiffs. The State made several objections to the fee applications, including general claims of overbilling, billing time for secretarial services, and billing for multiple people unnecessarily attending the same proceedings. The district court examined the objections and, agreeing with the State in part, reduced one fee award by $6,500 (J.A. at 62), and another by $800 (J.A. at 66).[17] These reductions are strong evidence that the district court, while not specifically addressing each *Barber* factor, carefully

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[16] We note that the district court had dealt with the issue of attorney's fees awards in the underlying case since the submission of the first motion for attorney's fees by Plaintiffs on April 24, 1992. As a result, the district court and the parties were intimately familiar with the necessary background information used to evaluate each attorney and the type of work involved in this case.

[17] Also, Plaintiffs voluntarily reduced fees by $8,143 in response to the State's objections. (J.A. at 59.)

considered each fee application. *See Colonial Williamsburg*, 38 F.3d at 138 (holding that the district court's disallowance of all requested fees was evidence of adequate review of petition for attorney's fees, despite the court's failure to address all *Barber* factors). Accordingly, we cannot say that the district court abused its discretion by not addressing each of the *Barber* factors, and we affirm the district court's determination that the fees awarded were "reasonable" under 42 U.S.C.A. § 1988.[18]

2.

Although we conclude that the district court properly found that Plaintiffs were entitled to fees for the work performed relating to the December motion and that the fee affidavits submitted were not unreasonable under 42 U.S.C.A. § 1988, the district court erred when it found that the PLRA's attorney's fees limitations were inapplicable to this case. The PLRA requires Plaintiffs to prove that the fees requested were "directly and reasonably incurred in proving an actual violation of the plaintiff[s'] right[s or] in enforcing the relief ordered for the violation." § 803(d)(codified at 42 U.S.C.A. § 1997e(d)(1)). This Court, of course, expresses no opinion as to whether Plaintiffs have met the above requirements. However, if upon reconsideration, the district court determines that Plaintiffs have satisfied the criteria set forth in § 1997e(d)(1)

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[18] In concluding that the district court carefully considered all the pertinent factors when determining the reasonableness of the fees awarded pursuant to 42 U.S.C.A. § 1988, we further rely on our affirmance of an earlier district court order awarding attorney's fees in this case. In *Alexander S. ex rel. Bowers v. Boyd*, 89 F.3d 827 (4th Cir. 1996) (unpublished), we rejected the State's same argument that the district court failed to adequately address all the *Barber* factors and affirmed the award which was based, in part, on the same general attorney background information and billing rates relied upon by the district court in these appealed orders.

for entitlement to attorney's fees, we instruct the district court to recompute its fee award in light of the hourly cap imposed by § 803(d). Again, we express no opinion as to whether Plaintiffs' counsel should be compensated at the maximum rate allowable or a reduced rate. These determinations are left to the discretion of the district court.

IV.

In conclusion, we reverse the district court's holding that the attorney's fees limitations set forth in § 803(d) of the PLRA (codified at 42 U.S.C.A. § 1997e(d)) are limited to prisoners confined to adult facilities. Rather, we conclude that § 803(d)'s attorney's fee limitations apply to any action brought by an incarcerated juvenile challenging the constitutionality of his conditions of confinement pursuant to 42 U.S.C.A. § 1983 or any other Federal law in which the attorney's fee is awarded subsequent to the enactment of the PLRA. We find no evidence in the express language of the PLRA or its legislative history to indicate that Congress intended to exclude juveniles confined in juvenile facilities from the far-reaching effects of the PLRA. To the contrary, an examination of the entire Act reveals a concerted effort to include juveniles within the scope of the PLRA.

We affirm the district court's conclusion that Plaintiffs are eligible for attorney's fees under 42 U.S.C.A. § 1988. However, we remand the appealed orders and direct the district court to apply the attorney's fees limitations of the PLRA when determining the amount of, and Plaintiffs' entitlement to, attorney's fees.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

DIANA GRIBBON MOTZ, Circuit Judge, Concurring in Parts, I., II., III.A. and C., IV., and in the judgment:

Section III.B. of Judge Williams' opinion applies the Supreme Court's *Landgraf* analysis to determine whether 42 U.S.C.A. § 1977e(d)(3) (West Supp. 1997) has a "retroactive effect." I write separately to state why I believe that application of § 1997e(d)(3) to the fees at issue here presents no retroactivity question.

Section 1997e(d)(3) provides that attorney's fees under 42 U.S.C. § 1988 "shall not be *awarded*, except to the extent that" the hourly rate is capped at "150 percent of the hourly rate established under section 3006A of Title 18." (emphasis added). The plain language of the statute directs that it applies when a court makes its *award*, not when an attorney completes his work, or totals his time, or submits his fee request, but when a court awards fees. Therefore, the only "retroactivity" question involving § 1997e(d)(3) is whether it applies to fees awarded before its enactment. Because the fees at issue here were awarded on May 29, 1996, a month after the effective date of the statute (April 26, 1996) this case presents no retroactivity question.

I cannot accept Judge Murnaghan's suggestion that the district court awarded fees on February 16, 1996. The district court's February 16 order declared plaintiffs entitled to fees; it awarded them nothing. Even after a victory on the merits or a declaration of entitlement to fees an attorney has no right to a specific fee under § 1988 until the actual fees are awarded. A district court must apply a twelve factor test, and can always grant an attorney less than he requests. In short, because § 1997e(d)(3) only affects the *rate* at which attorneys are compensated it has no "retroactive effect" on their entitlement to some fees -- it does not "impair rights a party possessed when he acted." *Landgraf v. USI Film Prods.*, 511 U.S. 244,

114 S.Ct. 1483, 1505 (1994).* For this reason, the *Landgraf* analysis, which bedevils my colleagues, is unnecessary here.

I note that, if *Landgraf* did apply, its initial step would resolve this case. That step requires determination of whether "Congress has expressly prescribed the statute's proper reach." Id. at 280. If so, "there is no need to resort to judicial default rules." Id. By expressly stating that § 1997e(d)(3) applies to an "award" of fees Congress clearly evidenced its intent to affect a fee "award" regardless of when legal work was completed. To hold otherwise would require us to add the following clause to § 1997e(d)(3): "such fees shall not be awarded [*for work completed after the passage of this Act*]."

MURNAGHAN, Circuit Judge dissenting:

Because I would follow the Seventh and Eighth Circuits and find that the attorney's fee provision in 42 U.S.C.A. § 1997e does not apply retroactively, I dissent as to part III.B.2.

Section 803(d) of the PLRA provides that in cases such as the case at bar, "[n]o award of attorney's fees" shall be awarded greater than 150% of the local hourly rate for court-appointed counsel.[1] Since the PLRA was passed on

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* I recognize that *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996), and *Cooper v. Casey*, 97 F.3d 914, 921 (7th Cir. 1996), found that it would be "`manifestly unjust' to upset [an attorney's] reasonable expectations and impose new guidelines at this late date." *Jensen*, 94 F.3d at 1203; *see also Cooper*, 97 F.3d at 921. But regardless of the statute's "fairness" it only changes the rate of renumeration, it does not strip an attorney of any previously established right to a specific award of attorney's fees, because there is no such right until the court awards the fees.

[1] As the majority points out, plaintiffs do not dispute that the rate under the PLRA is $112.50. Although the state does not concede that plaintiff's counsel's hourly rate should be set at $112.50, the district court specifically stated that if the PLRA applied it would set counsel's fees at the maximum amount.

April 26, 1996, the Court must determine whether the fee-limiting provisions in the PLRA apply retroactively to work done before the passage of the act.

In *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), the Court set out the procedures for determining whether a statute should apply retroactively. First, the court should determine whether "Congress has expressly prescribed the statute's proper reach." *Id* at 1505. If Congress has not done so, "the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If the statute has language indicating possible retroactive effect, the presumption against retroactivity prevails unless there is "clear congressional intent favoring such a result." *Id.* If the statute does not indicate retroactive effect, then the court should "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice." *Bradley v. School Board of Richmond,* 416 U.S. 696, 711 (1974).

Nothing in the section 803(d) "*expressly* prescribed [its] proper reach." (emphasis added). The Majority argues that the language "no award of attorney's fees" expressly prescribes the statute's reach in that it indicates that the statute applies when fees are awarded. However, such language certainly does not "expressly" indicate that the Congress intended § 803(d) to apply retroactively. *See also Leland v. Federal Ins. Adm'r*, 934 F.2d 524, 528 (4th Cir. 1991) ("[E]ven where some substantial justification for retroactivity is presented, courts should be reluctant to find such authority absent an express statutory grant.")

In fact, there is evidence that Congress intended that § 803(d) should apply prospectively. Section 802 of the PLRA specifically provides that § 802 applies to relief "granted or approved before, on, or after the date of enactment of this title." Section 803, however, is silent in that regard. Although

the fact that Congress expressly indicated that § 802 applies retroactively and did not do so for § 803 may not "expressly" indicate that the Congress intended § 803(d) to apply retroactively, it does, however, indicate that when Congress chooses to expressly indicate that a provision is retroactive it can clearly do so.

Secondly, a plain reading of the statutory language in the instant case does not weigh in favor of retroactivity. Based on the Majority's argument, the statute applies on the date attorney's fees were awarded. Thus, if attorney's fees are awarded after the date of the PLRA, the PLRA applies even if the work was done prior to the enactment of the PLRA. It concludes that attorney's fees were awarded after the date of passage of the PLRA and therefore the PLRA applies. However, under the facts in the instant case, attorney's fees were awarded well before the passage of the PLRA.[2]

As the Majority concedes, the Appellees were awarded fees for monitoring activities. In its February 16th order, the district court set up specific instructions regarding how the fees would be paid. Moreover, there was no question that the February 16th order granted attorney's fees to the parties for monitoring activities, the only questions were at what rate and for how many hours. Therefore, the "award" of attorney's fees occurred on February 16, 1996 when the court set out its instructions regarding how further fees would be paid. These

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[2] The fees were not "ordered" until after the passage of the PLRA. In addition, the court's August 30, 1996 order referenced and incorporated the previous order. The specific fee amount in the August 30th order dated back to the February 16th award and amounted to a *nunc pro tunc* award. The fact that the specific fee calculation was made after the award does not mean that the award itself was not made on an earlier date.

fees were not "ordered" until after the passage of the PLRA, but they were "awarded."[3]

Even if this reading of the statute is inaccurate, it certainly indicates that the statement "award of attorney's fees" is insufficient to establish that Congress clearly prescribed the reach of the statute. Since Congress did not expressly prescribe the reach of § 803, the Court must determine whether the statute would have retroactive effect. *Landgraf*, 114 S. Ct. at 1505.

In the instant case, plaintiffs' attorneys had a legitimate expectation that they would receive payment for services rendered. The district court awarded such payment in its February 16 order. The court clearly set out procedures, which, if followed by the plaintiffs' attorneys, would entitle plaintiffs' attorneys to receive compensation at the prevailing rate. Plaintiffs' attorneys continued their monitoring activities based on such an understanding. Thus, the statute would certainly have retroactive effect.

The Seventh and Eighth Circuits have reached similar results. In *Jensen v. Clarke*, 94 F.3d 1191, 1202 (8th Cir. 1996), the court determined that applying 803(d) retroactively would "have the retroactive effect of disappointing reasonable reliance on prior law." In addition, the court further stated that "when the attorneys were exerting what the District Court quite fairly described as herculean efforts on [plaintiffs'] behalf, they expected to have their fee determined under Section 1988. If we apply the Act, those expectations will be foiled." *Id.* at 1202 (internal quotations omitted); *see also Cooper v. Casey*, 97 F.3d 914, 921 (7th Cir. 1996) (to apply the statute retroactively would "attach (without clear indication of congressional intent to do so) new legal consequences to completed conduct, mainly the services rendered by the

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[3] In its February 16, 1996 order, the district court stated: "The court further finds that plaintiffs are entitled to fees . . . related to monitoring activities." J.A. at 31. In my view, this is an award of attorney's fees.

plaintiffs' counsel in advance of the passage of the new Act."). I agree with the Seventh and Eighth Circuits and believe that applying the Act retroactively would have retroactive effect.

The Majority argues, based on *Bradley*, 416 U.S. at 696, that changes regarding fee determinations do not have retroactive effect. In *Bradley*, the Supreme Court determined that a statute allowing courts to award fees to prevailing parties in school desegregation cases could be applied retroactively. *Id.* at 723-24. However, the Court based this decision on the fact that applying the statute retroactively would not have changed the liabilities of the parties or the parties' expectations. *Id.* at 721. The Court determined that since the district court had already awarded fees based on common law principles, applying the fee determination retroactively did not upset the parties' expectations and did not create an "unforeseeable obligation." *Id.*

However, in the case at bar, the parties' expectations, pursuant to the February order, were that they would be paid the prevailing rate for attorney's fees. Since the parties had previously been awarded fees, the rate for such fees was already set by the court. The district court's order recognized this and did not require plaintiff's attorneys to refile affidavits regarding fees. Therefore, unlike in *Bradley*, the attorneys in the instant case had an expectation that they would be paid. Reducing these fees would place an "unforeseeable obligation" on plaintiff's attorneys because, after services had been provided, they would be required to provide those services at a reduced rate.

Since Congress did not expressly provide that § 803(d) applied retroactively and since applying the statute retroactively would have retroactive effect, the traditional presumption against retroactivity should apply. However, even if the statute does not have retroactive effect, the statute should not be applied retroactively because doing so would result in "manifest injustice." *Id.* at 711.

In *Bradley*, the Court held that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in `manifest injustice' or there is statutory direction or legislative history to the contrary." *Id.* Applying this statute retroactively would clearly result in "manifest injustice."

The parties in the instant case have been embroiled in litigation for several years. Plaintiffs have sought and been awarded fees on several occasions. In addition, plaintiffs' attorneys were involved in continued monitoring activities. Holding § 803(d) retroactive and applying a reduced rate for attorney's fees for work already done will certainly create a manifest injustice on the parties. *See Jensen,* 94 F.3d at 1203 ("It would be `manifestly unjust' to upset those reasonable expectations and impose new guidelines at this late date."); *Weaver v. Clarke*, 933 F. Supp. 831, 835 (D. Neb. 1996) ("[R]etroactive imposition of the section of the PLRA . . . would cause `manifest injustice' to lawyers like Plaintiff's counsel who have performed their ethical obligations to the courts upon settled expectations premised upon precedent that if they `prevailed' they would be compensated.")

Moreover, Bradley also held that a statute should not be applied retroactively if "there is statutory direction or legislative history to the contrary." *Bradley*, 416 U.S. at 711. Although there is no language which "expressly" applies the statute retroactively or prospectively, there is evidence that Congress did not intend for § 803(d) to apply retroactively. When Congress passed the PLRA it expressly made § 802 applicable to relief granted before the passage of the Act. § 802(b)(1). However, § 803(b) is silent as to its application. Since Congress saw fit to clarify that § 802(b) applied retroactively, it can be inferred that the exclusion of such clarifying language in § 803 indicates that Congress did not

intend § 803 to apply retroactively.[4] *See Jensen,* 94 F.3d at 1203.

Since I believe that § 803(d) does not apply to work completed before the passage of the PLRA, and because I believe it is manifestly unjust to apply § 803(d) retroactively in the instant case, I dissent as to part III.B.2.

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[4] I concede that this does not express clear intent; however, it does indicate that there is "statutory or legislative history to the contrary" regarding retroactivity. *Bradley*, 416 U.S. at 711.

Furthermore, the Majority indicates that one of the major purposes of the Act was to stem frivolous law suits. Applying the statute retroactively in no way furthers this goal. In fact, in the instant case, it is clear that the lawsuit was not frivolous in that plaintiffs were determined to be the prevailing parties. Obviously their suit could not have been frivolous if they prevailed in their action.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Alexander S., et al.,	)
	)
Plaintiffs,	)
v.	)
	)
Flora Brooks Boyd, et al.,	)
	)
Defendants.	)

C/A No.: 3:90-3062-17

Entered: February 16, 1996

INTERIM ORDER ON STAFFING ISSUES AND ATTORNEYS' FEES

The present order is issued as an interim measure while the court considers what, if any, further modifications are necessary to the defendants' plan for correcting unconstitutional conditions at the Department of Juvenile Justice ("DJJ"). This order is addressed primarily to the issue of adequate staffing as raised by plaintiffs' Emergency Motion for Temporary Relief (filed August 28, 1995) and plaintiffs' Motion to Modify the Plan (filed September 22, 1995). This order also addresses attorneys fees incurred from the time of trial through the hearing on plaintiffs' present motions.

Because this order grants interim relief, the motion shall be treated as granted in part, but will be subject to later reconsideration. The clerk shall so mark the docket. The

court may order further relief on its own or renewed motion of plaintiff's as noted herein (p. 9).

PROCEDURAL HISTORY

This action was filed on December 28, 1990. It came before the court for an extended non-jury trial beginning on June 13, 1994, and ending on August 29, 1994. As a result of that trial, this court found that the defendants had failed to satisfy certain constitutional minimums in the care and custody of the juveniles incarcerated by DJJ. Order filed January 25, 1995.

Staffing was among the areas identified by this court as inadequate in its January 25, 1995 order. Order at 30-39. The court also found constitutional inadequacies in the areas of programing and overcrowding which, necessarily, have an impact on the issue of adequate staffing. Order at 28-39. In deference to the State and the expertise of the defendants, however, the court did not specify a given staff-juvenile ratio or other specific means to cure the deficiencies. Rather, the court allowed defendants to propose a plan to remedy the various deficiencies. Order filed January 25, 1995 at 5 & 55-57. The court expressly declined to impose a population cap as part of any remedy.[1]

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[1] This court has repeatedly declined to place a population cap on the number of juveniles incarcerated in the juvenile justice facilities. *See* Order dated January 25, 1995 at 7-8. Such a move would be a disservice not only to the general public but to the juveniles themselves who are, according to the laws of the State, placed in these facilities for purposes of rehabilitation rather than punishment. *See* Order dated January 25, 1995 at 10-11. As noted in this court's January 25, 1995 order, the last facilities in DJJ were built in the 1970's, bringing the total "rated capacity" to 299. The construction of these facilities at that time corrected what were apparently major deficiencies. *Id.* at 11-12. While it is difficult to locate precisely comparable statistics, it is abundantly clear that the significant increase in the general population and, more particularly, the increase in violent and serious juvenile crime, since

The defendants' plan was submitted on May 25, 1995, was supplemented on June 23, 1995, and was approved by the court by order filed June 28, 1995. The court retained jurisdiction to oversee implementation of the plan. Order filed June 28, 1995 at 3.

Central to defendants' plan to improve overcrowding and staffing levels was an expectation that they could "reduce the population of the current long-term facilities by 100 as of July 15, 1996, and by a total of 200 as of July 15, 1997." Plan at 4-5. This reduction would be relative to the population at the time of trial, which then ranged from 670 to 730 juveniles at the long-term institutions which had an overall "rated capacity" of 299. Order filed January 25, 1995 at 14. The benefits of this population reduction were to be augmented in one or more of the following ways: hiring of additional staff; acquisition of additional facilities; and shifting of population to the Department of Corrections. Plan at 4-5. The additional staff was reported to the court to be in place as of or shortly after the time the plan was approved.

FACTORS LEADING TO THE PRESENT MOTION

On August 30, 1995, the court held a status conference on this case. At that conference, the court's monitor, Retired Family Court Judge Robert Burnside, reported to the court that defendants had made significant improvements in various areas covered by the plan. He

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the 1970's necessitates a far greater capacity than what was built in the 1970's to remedy inadequacies existing at that time. *See generally id.* at 12. The State cannot, realistically, expect to treat this decade's juvenile justice problems with facilities and budgets of twenty or more years ago and this court will not encourage such a shortsighted remedy by providing the "easy" solution of a population cap. Indeed, it appears various entities within state government are making progress towards developing realistic long-term solutions.

further reported, however, that the combination of overcrowded conditions and under staffing caused him to fear for the safety of the juveniles, particularly in dormitories lacking special programs.

Shortly before this status conference, on August 28, 1995, plaintiffs filed their Emergency Motion for Temporary Relief which alleged that the unconstitutional conditions, particularly related to staffing issues, had not improved. On September 22, 1995, plaintiffs superseded this motion by filing their Motion to Modify the Plan. In their supporting memorandum, plaintiffs reported that as of July 13, 1995, the juvenile population at DJJ had risen to 851, rather than declining as anticipated by defendants' plan. Defendants opposed plaintiffs motion primarily on the grounds that the plan had only recently been approved and had had little chance to prove its effectiveness. Memorandum in Opposition filed September 12, 1995 at 3-5. Nonetheless, defendants did not contest that the number of incarcerated juveniles was rising dramatically.[2]

Given the seriousness of the issues raised by plaintiffs' motions the court scheduled a hearing on the limited issue of staffing levels as they related to the safety of the juveniles. A brief period for discovery was allowed before the hearing which was held beginning on December 18, 1995 and continuing through December 20, 1995.

TESTIMONY

Plaintiffs presented witnesses who testified to unsafe conditions caused by lack of staffing. These witnesses

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[2] In a letter to the court dated November 28, 1995, defendants' counsel stated: "DJJ continues to be hampered by overcrowding, reaching a record high of some 1000 juveniles at the three long term institutions last week. . . . The disturbing fact is that overcrowding is increasing rather than decreasing or staying level since the case was tried."

included a number of juveniles who testified to various altercations occurring on campus. The testimony of plaintiffs' witnesses would support the conclusion that there were problems with inadequate staff which problems were exacerbated by increasingly overcrowded conditions and by the lack of organized activities for the juveniles. In particular, several witnesses testified that most altercations occurred on the weekends or during evening hours when all juveniles were in the dorms and not engaged in programs.

Defendants attempted to discredit the testimony of a number of plaintiffs' witnesses by demonstrating that juveniles who became involved in altercations were usually engaged in inappropriate activities such as the sale of contraband or association with on-campus "gangs." Defendants suggested that such activities increased the likelihood juveniles would be involved in fights. Of course, defendants' argument here would cut both ways as the opportunity to engage in prohibited activities itself suggests lack of adequate supervision.

The court need not, however, draw any conclusions from the testimony of plaintiffs' witnesses at this stage because the need for greater staff was admitted by defendants' own witnesses. Moreover, defendants implementation of a modified plan at or near the time of the hearing limits the usefulness of the testimony of plaintiffs' witnesses who necessarily would not have had an opportunity to observe the impact of the modified plan.[3]

Both the Director of the Department of Juvenile Justice, Ms. Flora Brooks Boy, and her Assistant Deputy Director for Institutional Operations, Mr. George Hampton,

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[3] The court is not suggesting that plaintiffs acted too hastily in bringing the present motion or that they should not have pursued it after filing. Rather, as discussed below, the timing of the defendants' disclosure and implementation of its modified staffing plan suggests that the plaintiffs' actions were instrumental in bringing about staffing changes which defendants now concede were necessary.

testified that the juvenile population had increased rather than decreased since the trial one year earlier. According to Ms. Boyd, the population as of the time of the December 1995 hearing was at 1,025. Notably, this is over three times the "rated capacity" of the dorms (299), at least a forty percent (40%) increase over the population at the time of the original trial (then ranging from 670 to 730), and even a twenty percent (20%) increase over the population reported by plaintiffs when they sought modification of the plan (851 juveniles).

Despite their opposition to plaintiffs' motion to modify the plan, defendants conceded that modification was necessary. Defendant Boyd and her Deputy Director both agreed that more staff was needed in order to protect the juveniles from each other given the significant increase in populations. Mr. Hampton presented a plan to the court which called for significant increases in the number of staff on site in the dormitories, particularly during times when all juveniles assigned to the dorms are present and not engaged in supervised activities. He testified that these staffing increases were *the minimum needed to insure safety.* The precise number and resulting staff-juvenile ratio varied depending on the programs available to each dorm and the type population in the dorm.

Mr. Hampton testified that the plan he presented to assign additional staff to dorms had been in force for week days since a few weeks before the hearing (beginning on or about December 1, 1995). As to weekend hours, the decision to add staff was apparently not made until after the December 18, 1995 hearing began and was apparently based on the testimony of some of plaintiffs' witnesses.

Ms. Boyd agreed that the plan testified to by Mr. Hampton was the minimum necessary to insure safety. She testified that even greater staffing (approximately forty-two additional full time positions) would be needed to provide counseling, not just security, to the juveniles.

After hearing testimony of all the witnesses, the court asked defendants to submit a summary of their proposed staffing and program plan. This plan was filed with the court on January 16, 1996 and is found at Attachment A to this order.

INTERIM FINDINGS AND CONCLUSIONS

The defendants have admitted that significant increases have occurred in the population at the juvenile justice facilities. They have conceded that increased staffing is necessary to insure juvenile safety. Defendants have, in fact, testified to a specific plan which includes significant increases in staffing as the minimum level necessary to insure safety. Given this testimony by defendants, this court finds that the plan should be modified to require *at least* that level of staffing set forth in defendants' plan, Attachment A hereto. It is the court's understanding that, consistent with defendants' testimony regarding the plan, this plan will insure that extra staff is provided for each dormitory for all hours when substantially all assigned juveniles are regularly in the dormitory.[4]

This finding is, however, only interim and is subject to further modification after an appropriate amount of time has passed to allow evaluation of defendants' modified

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[4] The court recalls Mr. Hampton's testimony as being that the extra staff would be on site for all times when all or most of the assigned juveniles were actually in the dormitory other than hours when they should be asleep. The written plan, however, shows the extra staff only on Saturday, Sunday and School holidays as well as during a portion of the second shift hours. Because of a split school schedule as well as the post-wake-up but preschool morning hours, there may well be other hours when substantially all juveniles would be in the dorm and not engaged in organized activities. It is unclear from the written plan whether there are such hours and, if so, how the dorms would be staffed during these hours. Defendants shall clarify the plan in this regard.

staffing plan. The staffing plan as presented by defendants' witnesses was, as noted above, so new as of the date of the hearing that the plan had not previously been presented to the court, its monitor, or, apparently, the plaintiffs' counsel. The court was also unaware of other plans impacting on the related issues of overcrowding and programs which were presented by defendant in testimony and in Attachment A hereto. Significantly, during the very week of the hearing, meetings were being held by a special task force formed by the Governor to study and recommend further solutions to the juvenile justice problems. Thus, the information presented was not only new and somewhat complex, but also evolving.

Because defendant had not implemented this plan until shortly before (or in some regards after) the hearing, the testimony of plaintiffs' witnesses necessarily relates to a period before the present plan went into effect. The court, therefore, cannot evaluate the effectiveness of the defendants' modified plan based on the testimony provided at the hearing and will need additional information in order to reach a final determination on plaintiffs' present motions.

Moreover, other state initiatives such as those under consideration by the Governor's task force, may well generate other improvements which may eliminate the need for further action by this court. As this court has previously indicated, it prefers a course of allowing the State the first opportunity to select the means to correct deficiencies. This not only allows those with the greater expertise in the area to offer more effective and innovative solutions but, hopefully, encourages improvements which go beyond the constitutional minimum.

For these reasons, and to insure better future communication between the defendants, the court, its monitor and the plaintiffs' counsel, the court has requested monthly reports from defendant as to all matters covered in Defendants' Response to the Court's Order for Production of

Information (filed January 16, 1996). Attachment A. The requested report will include information as to whether the stated staffing requirements have been met, as to the defendants' progress on the various program plans, as to any injuries sustained by juveniles, and as to any population shifts or added dormitory space which might impact on overcrowding. Order filed January 9, 1996 at 3. Defendants have elected to provide these reports on the tenth of each month for the previous calendar month. To the extent other initiatives are adopted which go beyond those set forth in the plan, the defendants should appraise the court of these in the same report. The court will rely, in part, on these reports to determine the effectiveness of the modified staffing plan as proposed by defendants.

After a minimum of three months of data has been accumulated, the court will review these reports and, if it deems necessary, ask for additional testimony. Absent urgent circumstances, plaintiffs' should not renew their motion for relief on the staffing issues prior to three months. In the interim, the court's monitor will randomly confirm the validity of the reports and report to the court on related issues.[5]

ATTORNEYS FEES

1. Fees related to the present motion.

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[5] One area of concern is defendants' long-term reliance on overtime to fulfill the added staffing requirements. While there are obvious benefits to such an arrangement in the short-term, including the ability to avoid additional training and benefit expenses, there are corollary disadvantages to long-term use such as the potential that defendants will find themselves operating with an overworked, fatigued and disinterested staff. Experience of several months will allow the court and the parties to evaluate the effectiveness of defendants' plan in this regard.

Plaintiffs brought this motion shortly after the court approved defendants' plan. Despite the recency of the court's approval of the plan, plaintiffs argued that modification was necessary due to a change of conditions. The uncontested evidence at the hearing proved plaintiffs' position correct. In particular, defendants' original plan centered on a goal of reducing the population over the course of two years. As defendants conceded at the hearing, the population was moving rapidly in the opposite direction.

Defendants also conceded at the hearing that staffing levels significantly higher than those set forth in their plan were the minimum necessary to insure the safety of the juveniles. Notably, this concession was not made at any time prior to the hearing. Rather, defendants opposed plaintiffs' motion, arguing that their original plan should be given time to work. Memorandum in Opposition at 3 (filed September 12, 1995).

The timing of defendants' implementation of the changes is also significant. Most of the changes were not implemented until just before the hearing on the present motion. Other changes, in particular increased staffing on the weekends, were not implemented until after the hearing and appeared to have been a response to plaintiffs' witnesses' testimony.

Under these circumstances, the court finds that plaintiffs' advancement of the present motions and continued advocacy of them through the hearing were necessary to preserving the benefits gained in the initial litigation and to obtaining further benefits. For these reasons, plaintiffs are entitled to an award of attorney's fees related to the pursuit of this motion. *E.g., Plyler v. Evatt,* 902 F.2d 273 (4th Cir. 1990) (affirming award of fees for plaintiff's unsuccessful opposition to defendant's motion to modify a consent decree because plaintiff's counsel had an obligation to attempt to preserve the gains previously won); *Duran v. Carruthers,* 885 F.2d 1492, 1496 (10th Cir. 1989) (rejecting argument

that plaintiff's did not prevail on a motion which they filed but withdrew after a stipulated agreement). The court will separately address plaintiffs' fee request to the extent it relates to general monitoring activities. The procedures to be followed for submission of documentation supporting the fee request is also addressed below.

2. Monitoring activities.

Plaintiffs have requested approval for fees related to monitoring activities. For the reasons set forth below the court will allow plaintiffs to submit a request for payment of fees to cover a limited amount of monitoring activities.

Although they did not prevail on all issues, plaintiffs were prevailing parties in the underlying case. The court found various constitutional violations and allowed defendants to propose a plan to remedy those violations. Defendants' plan, as adopted by this court on June 28, 1995 and as modified by this order, by its own terms requires time for full implementation. Plaintiffs' counsel must have some role in insuring that implementation occurs in order to assure their clients of the benefits gained in this action. *Diaz v. Romer*, 961 F.2d 1508, 1511 (10th Cir. 1992) ("Case law and the plain language of 42 U.S.C. § 1988 clearly state that attorney's fees can be awarded for post-judgment monitoring and other efforts to ensure compliance with court orders in a civil rights case"). The present motion is evidence of this need.

The appointment of a court monitor does not take this role away from plaintiffs' counsel, although it may impact on the scope of plaintiffs' monitoring role. *Duran v. Carruthers*, 855 F.2d 1492, 1495 (10th Cir. 1989) (in case in which plaintiffs' counsel had a monitoring role under the consent decree, fact that the court and defendant both had monitors in place did not eliminate plaintiffs' counsel's role); *Keith v. Volpe*, 833 F.2d 850, 857-58 (9th Cir. 1987)

(consent decree's creation of separate monitoring entity did not preclude award to plaintiffs counsel for monitoring activities which were not duplicative of the activities of the decree-created monitor). As noted in *Duran*, "As in other institutional reform litigation, the entry of the Court's judgment has not terminated the role of the plaintiffs' counsel. . . . Without determined, competent and dedicated representation, the provisions of this Consent Decree might have little practical significance for the class members." *Duran*, 885 F.2d at 1496 *quoting Brewster v. Dukakis*, 544 F. Supp. 1069, 1072 (D. Mass.) *modified on other grounds* 786 F.2d 16 (1st Cir. 1986).

The department to be monitored in this case is a large entity undergoing significant changes in structure, population and staff. Monitoring its progress is, inherently, no small task. The court has directed defendants to provide certain reports which should aid in the monitoring process. These reports must be reviewed by the court, its monitor, and plaintiffs counsel. A reasonable amount of checking behind these reports as well as other monitoring is also reasonable to insure compliance. The court finds that it is appropriate both for the court's monitor and for plaintiffs' counsel to play some role in this monitoring process.

The court's indication that it will consider fee applications for monitoring activity is not, however, *carte blance* to invest uncontrolled amounts of time in monitoring. Neither is it prior approval of any fee request. The court will carefully scrutinize any fee application for monitoring services to insure that it is not duplicative of the activities performed by the court's monitor, and does not relate to matters beyond the court's order.[6] Although the court will

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[6] Plaintiffs have pursued various forms of relief which the court has previously rejected. Activities directed towards again seeking such relief would be beyond any monitoring role. Similarly, any activities of counsel which relate to damages claims which are pending or may be

set neither a floor nor a cap on plaintiffs' monitoring fees, the court anticipates that such fees should, on average, not exceed $3,000 per month. Should plaintiffs discover matters requiring either new motions on their part, such as is presently before the court, or should they be placed in a position of opposing a motion to modify the plan, related fees and expenses should be justified and dealt with separately from the monitoring activity.

3. Fee application procedures.

Plaintiffs have previously provided the court with copies of billing documents related to their attorneys fees incurred in pursuit of the present motion and various monitoring activities. These documents were not, however, filed with the court, apparently based on a belief that an agreement had been reached as to the payment of interim fees and that court intervention would not be necessary.

The parties have now informed the court that such agreement is unlikely. The court, therefore, directs plaintiffs to file all billing documents previously provided to the court and defendants which related to either the present motion or monitoring activities. These documents should be provided along with an appropriate affidavit indicating the matter to which these fees relate. These documents shall be filed within five days of filing of this order. The court will not require plaintiffs to file affidavits which duplicate the general attorney background information and billing rates filed in support of the prior fee application except as to any new attorneys or attorneys for whom plaintiffs are now claiming a different billing rate. The court will rely on the affidavits

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brought on behalf of individual juveniles are also beyond the monitoring role. While the court recognizes that one activity may lead to the other, the court directs counsel to carefully review their time records before submission to eliminate any requests for time which go beyond the pure monitoring role.

previously filed in this matter absent specific objection from defendants.

Because the court is specifically directing plaintiffs to submit the bills in the form previously provided and because defendants have indicated some general concerns as to specificity of the billing documents, the court will establish the following procedure for the fee submission in this case. Defendants shall be allowed ten days after service of plaintiffs initial affidavits and billing documents to draw the court's attention to any perceived inadequacies in the form of plaintiffs' fee submission to the court. Plaintiffs shall be allowed ten days after the filing of defendants' specification of inadequacy to supplement the previously filed documents. Defendants shall then be allowed the usual fifteen days after service of plaintiffs' supplementation to provide any objections to the content of plaintiffs' submission. Local Rule 16.00, DSC.

CONCLUSION

For the reasons stated above, the court will order interim relief to plaintiffs by requiring defendants to comply with the staffing plan set forth in attachment A hereto. Defendants shall supplement this plan as noted in footnote 4 above and shall provide the reports required as noted herein and in the court's order filed January 9, 1996, on a monthly basis. The court will review the adequacy of the staffing based on these reports, the reports of the court's monitor, and such further information as the court may request. The court's review shall be conducted no earlier than April 15, 1996, absent exigent circumstances.

The court further finds that plaintiffs are entitled to fees for pursuit of this motion and related to monitoring activities. Plaintiffs shall submit their fee application as set forth herein.

IT IS SO ORDERED.

s/_____
Joseph F. Anderson, Jr.
United States District Judge

February 16, 1996
Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Alexander S., Alfred S., Benny B., Christopher M., Lafayette M., and Ricky S., by and through their Guardian ad Litem, Lesly A. Bowers, individually and as representatives of a class of juveniles,

Plaintiffs,

v.

Flora Brooks Boyd, in her capacity as Director of the Department of Juvenile Justice,

Defendant.

C/A No.: 3:90-3062-17

Filed May 29, 1996
Entered May 29, 1996

ORDER AWARDING ATTORNEYS' FEES

This order addresses plaintiffs' supplemental motion for attorneys' fees and costs which was filed February 21, 1996, in compliance with this court's earlier instructions. *See* Interim Order on Staffing Issues and Attorneys' Fees (filed February 16, 1996). For the reasons discussed below, plaintiff's request for fees is granted in part.

The present fee request relates to two different areas: (1) fees related to the plaintiff's motion to amend the plan as it relates to staffing; and (2) fees for monitoring activities. As to the first area, fees related to the motion to amend the plan, this court has previously found that plaintiffs are entitled to

an award of attorney's fees because their advancement and continued advocacy of this motion was "necessary to preserving the benefits gained in the initial litigation and to obtaining further benefits." Interim Order at 10. As this court noted in that order,

> [t]he uncontested evidence at the hearing proved plaintiff's position [,that modification of the plan was necessary,] correct . . . .
>
> Defendants also conceded at the hearing that staffing levels significantly higher than those set forth in their plan were the minimum necessary to insure the safety of the juveniles. Notable, this concession was not made at any time prior to the hearing. Rather, defendants opposed plaintiffs' motion, arguing that their original plan should be given time to work.

Interim Order at 9-10.

This court also found that some award of fees for monitoring activities would be appropriate. Interim Order at 10-12. This court estimated that an appropriate degree of monitoring should not, on average, exceed $3,000 per month. *Id.* at 12. As to both of these areas, the court directed plaintiffs to file their fee request with the court. The court set out specific procedures to be followed for objections or supplementation of the present fee request. *Id.* at 12-13. The parties have now fully complied with the court's directions and have assured the court that neither desires further oral argument on this fee request. The court, therefore, addresses the fee request based solely on the documents filed with the court.

The court has also examined certain recent amendments to Titles 18 and 42 of the United States Code which are contained in the Prison Litigation Reform Act of 1996. These amendments were signed into law on April 26, 1996. There is some dispute whether the amendments to 42 U.S.C. § 1977(e), which cap the rate for payment of attorneys' fees in certain institutional litigation, apply in this case. The specific issue turns on whether a juvenile justice facility is a "jail, prison, or other correctional facility" as defined by that Section of Title 42. Because the fees presently at issue were all incurred before the date of this legislation, however, the court does not find it necessary to resolve the reach of the fee limitation at this time.[1]

In their initial request, filed February 21, 1996, plaintiffs sought a total of $180,635.50 in attorneys fees and $13,474.22 in costs and expenses to be paid to the law firm of Fairey, Parise & Mills, P.A. They also sought $7,605.00 in fees and $87.72 in costs to be paid to the South Carolina Protection and Advocacy System for the Handicapped, Inc. ("SCPASH"). *See* Plaintiff's Memo at 5-6 (filed February 21, 1996).

Defendant filed a timely memorandum specifying the inadequacies she perceived in plaintiffs' fee submission. Defendant's Memorandum filed March 4, 1996. Plaintiffs responded by withdrawing that portion of their fee request which related to a motion this court had denied in the interim (reducing the request by $5,526.75). Plaintiffs also agreed that time spent defending a separate attorneys' fee was erroneously included (reducing the fee

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[1] Although the amendments to Title 18, expressly indicate that the limitations in that Title are effective even as to previously granted prospective relief (if still in effect), the Title 42 amendments do not contain such a provision. Even the Title 18 language would seem ineffective to modify a rate to be paid for work already completed.

request by another $2,336.25). Finally, plaintiff agreed to withdraw its claims for services that defendant challenged as secretarial in nature ($280.00). Combined, these agreed to reductions totaled $8,143.00 to be deducted from the fees of Fairey, Parise & Mills. Plaintiffs' submission further indicated that they had met with defense counsel and now understood that all but three of defendant's remaining objections had been satisfied.

Defendant then filed a memorandum setting forth two specific objections to the remaining fee requests. Neither of these related to fees for monitoring or fees claimed by SCPASH, as to which there appear to be no further objection. *See generally* Interim Order at 10-12. In a recent status held May 1, 1996, defense counsel confirmed that all other objections had been satisfied or resolved by the plaintiffs' reduction in their fee request. Therefore, this court will address only these two specific objections.

Defendant's first remaining objection is that the "results obtained" do not justify the fee award sought as to the staffing issue because "the Court was forced to reserve judgment in that sufficient data was not elicited by plaintiff's for the court to issue a final, rather than interim, order after the December hearing. Defendant state that "[t]his failure led the Court to require [defendant] to report incidents of fighting and injury directly to the Court in the months since the hearing." Defendant's memorandum at 2. Defendant's second challenge is to the amount of time spent on a particular memorandum of law submitted to support plaintiff's staffing motion. These matters will be addressed in turn.

The court cannot agree with defendant's first argument. As this court found in its February 16, 1996 order, plaintiffs prevailed on the issues then before the court. The court was forced to reserve judgment as to the specific remedy to be imposed not because plaintiffs

presented inadequate evidence, but because defendant conceded, during the second half of the hearing, that prior staffing was inadequate. Defendant also announced a new staffing plan at that time. Notably, this plan was not disclosed to plaintiffs or the court until after plaintiffs had presented their case. Up to that point, defendant opposed the need for *any* modification of the plan.

In light of defendant's concession of the need for greater staffing combined with a specific proposal, this court decided to allow a short period of time to test defendant's proposed modified staffing plan before imposing a further court requirement. Nonetheless, the court left such a possibility open. The monthly reporting requirement was imposed to insure that adequate information could be gathered in a cost effective manner to keep the court, the court's monitor, and plaintiffs' counsel informed of the success of the defendant's new staffing plan and related matters.

Nothing in this court's decisions to allow time to test defendant's newly announced plan before imposing further court mandates or to require reporting of the basic information necessary to evaluate that plan's success can reasonably be construed as indicating a lack of success by plaintiffs. The court's restraint in selecting a remedy does not modify the fact that it was plaintiffs' pursuit of their motion which led to the defendant's decision to increase staffing.[2]

Defendant's second challenge is to time spent on the memorandum of law dated December 8, 1993. Defendant

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[2] Notably, defendant's witnesses testified to a plan which included even greater increases in staffing than was shown on the written plan submitted by defendant as an exhibit. The additional staffing concern, in turn, were raised by the testimony of plaintiff's witnesses. The plan itself was implemented in part immediately before and in part immediately after the December hearing. Plaintiffs' motion, by contrast, was filed several months earlier.

contends that slightly more than eighty hours (80.3) were spent on this twenty-three page memorandum which is, in defendant's view, an excessive amount of time. Indeed, defendant argues that no memorandum at all was necessary as there were no issues of law to be determined. Despite their general challenge to the time spent on the memorandum of law, defendant has not specified which dates and time entries are included in the challenged time. Plaintiffs, however, do not seem to challenge that a total of 80.3 hours were spent on the legal memorandum. This court will, therefore, assume this amount of time spent on the single pretrial legal memorandum.[3]

As noted above, defendant first argues that there was no issue of law to be determined. The court disagrees. Throughout the time the staffing motion was pending, defendant maintained that the court should not or could not modify the plan because the court had only recently adopted it. Instead, defendant argued that the plan should be given time to work. Plaintiffs' memoranda presented case law which supported allowing modification in the event of a change in conditions.

This is not, however, to say that the full time claimed should necessarily be approved. From what the court can determine, the work began approximately one month before the memorandum was finalized and continued until December 8, 1995, the date the document was signed. The time was approximately evenly split between attorneys Rochelle Romasca and Gaston Fairey and included research and drafting, apparently on a variety of legal issues. The billing rates for these attorneys for out-of court time $100 and $225 per hour respectively.

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[3] Defendant does not suggest that plaintiffs' counsel did not actually spend this amount of time on the document in question. Defendant only challenges the necessity for the time expended.

This court has examined the memorandum as well as the billing records. It is the court's conclusion, based on this review, that the final product could have been accomplished in less time, particularly since at least some of the issues had been previously briefed. The court recognizes that it often helpful to have a second attorney review a brief and the case law on which it relies. The court also recognizes that the realities of practice and preparation for an evidentiary hearing often lead to interruptions that can result in a project requiring more total time than might otherwise have been required. Similarly, the court is aware and appreciates that the length of the final memorandum should not determine the fee awarded. Taking all of these factors into consideration, the court, nonetheless believes that the total award should be reduced by the equivalent of forty (40) hours, half each at the rates charged by attorneys Romosca and Fairey. The court, therefore, reduces the fee to be awarded to Fairey, Parise, and Mills, by $6,500.00. In summary, the plaintiffs' initial fee request has been reduced and shall be paid as set forth below:

FEES TO BE PAID TO FAIREY, PARISE & MILLS, P.A.

	Fees	Costs
Amount on original request :	$180,635.50	$13,474.22
Agreed - to reductions	8,143.00	0.00
Court ordered reductions	6,500.00	0.00
TOTAL AWARD	$165,992.50	$13,474.22

FEES TO BE PAID TO SOUTH CAROLINA PROTECTION & ADVOCACY FOR THE HANDICAPPED SYSTEMS, INC.

Amount originally requested	$7605.00	$87.72
Agreed to reductions	0.00	0.00
Court ordered reductions	0.00	0.00
TOTAL AWARD	$7605.00	$ 87.72

The above stated amounts shall be paid within thirty (30) days of the date of entry of this order.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.
Joseph F. Anderson, Jr.
United States District Judge

May 29, 1996
Columbia, South Carolina

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Alexander S., Alfred S., Benny B., Christopher M., Lafayette M., and Ricky S., by and through their Guardian ad Litem, Lesly A. Bowers, individually and as representatives of a class of juveniles,

Plaintiffs,

v.

Flora Brooks Boyd, in her capacity as Director of the Department of Juvenile Justice,

Defendant.

C/A No.: 3:90-3062-17

Filed August 30, 1996
Entered August 30, 1996

ORDER AWARDING ATTORNEYS' FEES FOR THE PERIOD FEBRUARY-JULY 1996

Presently before the court are various motions for fees and costs submitted by counsel for plaintiffs. These fee applications will be addressed separately based on the time frames covered.

February through March 1996 Application

The first application covers the months of February and March 1996. This application was filed on April 9, 1996. The amounts sought total $23,529.25 in fees and $1,584.12 in costs for the law firm of Fairey, Parise & Mills P.A. An additional amount of $2,296.00 is sought for attorneys fees for services provided by the South Carolina Protection and Advocacy System for the Handicapped, Inc.

Defendant filed a timely objection to certain of these fees on April 19, 1996, to which plaintiffs replied by memorandum filed May 1, 1996. The parties have expressly indicted that they do not desire any further hearing and the court, likewise, does not believe oral argument would aid the court in its decision.

The objections raised by defendant fall into three general categories: (1) a general claim of a pattern of over billing with specific references to multiple persons attending three separate meetings or court hearings (accounting for a total of just over fifteen (15) of the hours claimed), and the amount of time spent related to attorneys fees issues (accounting for seventy-five (75) hours of the total request of which approximately thirty-five (35) hours appear to be related to compiling billing data or responding to prior challenges by defendant to fee submissions); (2) billing time for services which are secretarial in nature (planning an itinerary, assembling exhibits and trial materials, data entry and mailing or faxing letters); and (3) having multiple people attend the same hearing or deposition (this appears to duplicate the first argument). As to the latter two categories defendant does not provide a specific amount of time which she believes is improperly claimed, although defendant does specify at least some of the relevant entries as to the second category.

In their responsive memorandum, plaintiffs argue that there were only a few meetings at which there were multiple attendees. They further argue that the multiple attendance at those few meetings was a cost effective means of meeting with clients and co-counsel. Likewise, plaintiffs points out that they are only seeking time for the attendance of two attorneys at the one court hearing.

Obviously, in order to coordinate efforts and insure the most cost effective personnel are used, it is essential that some meetings occur between co-counsel as well with the plaintiff class members. It may well be less time consuming to have a single meeting with all counsel in attendance than a series of meetings between two persons. Similarly, in order to insure effective distribution of the workload, it may be necessary for more than one attorney to attend certain hearings. After reviewing the plaintiffs' submission, this court does not find the multiple attendance to be unnecessary or unreasonable under the circumstances.

As to the issue of time spent on the attorneys fee applications, the court notes that a significant number of issues were being addressed at the relevant time. Among these issues was defendant's argument that the stipulation regarding insurance coverage barred or severely limited plaintiffs' ability to recover fees. For reasons addressed in other orders, this court disagreed with defendant on this point.

Plaintiffs were also asked to break down their time by issue and attorney. This would not necessarily be required for a proper submission, although it is helpful to the court and defendants. Time spent in this effort cannot, therefore, fairly be characterized as "cleaning up" billing statements as defendant contends. This task would clearly have required a significant degree of time as the then-pending submission covered a period of eight months.

Therefore, while the nearly seventy-five (75) hours spent on attorneys fees issues during this period is far above

what the court would normally expect in a two month period, it is not unreasonable in light of the matters then being litigated. Nonetheless, it does appear to the court that at least some of the time invested by lead counsel might, more appropriately, have been handled by an associate. The court will, therefore, reduce the fee award by $800 (approximately one quarter of Mr. Fairey's time treated as if it had been Ms. Romosca's time[1]).

The court is also satisfied that the time entries challenged by defendant as secretarial in nature are not. Plaintiffs' explanation of the use of this time satisfies the court in this regard. The court will, however, caution plaintiffs to continue to guard against charging time that may be clerical in nature.

As plaintiffs note, the final allegation of duplication is, itself, merely duplicative of the earlier challenge under the first category. The court finds no specific matter under this challenge which needs to be addressed further.

Defendant has raised no further challenges as to the fees claimed and has suggested no challenges to the costs and expenses sought by plaintiffs. The issues of the rates payable,[2] the status of plaintiffs' counsel as prevailing parties, and the need for a level of ongoing involvement during the implementation phase have been addressed in previous orders. Subject to the reduction noted above, therefore, the court finds the amounts sought to be proper.[3]

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1 Ms. Romosca has recently married and now uses the last name McKim.

2 Consistent with this court's earlier order on attorneys fees, this court finds that the recent Prison Litigation Reform Act which became effective on April 26, 1996 has no impact on fee applications for time before April 26, 1996. *See* Order filed May 29, 1996 at 2.

3 As to monitoring, the court notes that the total hours (33.95) and fees ($3,690) for this two month period are well within the range this

The court's prior discussion and conclusions as to those issues are incorporated herein by reference.

Wherefore, this court finds that for the period February through March 1996, plaintiffs are entitled to attorneys fees and costs in the amounts set forth below:

Fairey, Parise, and Mills, P.A.

Fees requested:	$23,529.25
Reduced by:	- 800.00
AWARDED:	$22,729.25
Costs requested:	$ 1,584.12
AWARDED:	$ 1,584.12

South Carolina Protection and Advocacy System for the Handicapped, Inc.

Fees requested:	$ 2,296.00
AWARDED:	$ 2,296.00
Costs requests:	$ 97.41
AWARDED:	$ 97.41

April 1996 Application

Also before the court is plaintiffs' April 1996 supplemental motion for fees and costs covering the period April 1, 1996 through April 26, 1996. This motion was filed May 1, 1996. Defendant filed no opposition to this

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court would normally anticipate. *See* Order filed May 29, 1996 at 2 (anticipating an average not exceeding $3,000 per month). It also appears that an appropriate effort has been made to utilize the most cost effective personnel to handle this function.

submission. The court, therefore, finds this application to be unopposed and finds the matter ripe for resolution.[4]

Despite defendant's decision not to file any specific opposition, the court has carefully reviewed plaintiffs' submission. The court finds the application to be properly payable in the amounts requested. Wherefore, the court finds that defendant should pay plaintiffs' attorney fees and costs in the amounts set forth below.

Fairey, Parise, and Mills, P.A.

Fees requested:	$10,630.00
AWARDED:	$10,630.00
Costs requested:	$ 243.45
AWARDED:	$ 243.45

South Carolina Protection and Advocacy System for the Handicapped, Inc.

Fees requested:	$ 717.50
AWARDED:	$ 717.50
Costs requested:	$ 97.41
AWARDED:	$ 97.41

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[4] By letter to the court dated June 3, 1996, plaintiffs provided the court with a copy of defense counsel's May 7, 1996 letter to plaintiffs' counsel indicating that defendant had "no designation of inadequacies." The letter to the court, which was copied to defense counsel, indicated plaintiffs' understanding that the matter was ripe for resolution. The court has not received any specific objection from defendant since that time.

May Through July 1996 Applications

Finally, the court is presented with plaintiffs' fees submissions for the months of May, June and July 1996. These applications for fees raise a significant legal issue which is, in fact, the sole challenge raised in defendant's opposition memoranda. That is, whether the amendments to 42 U.S.C. § 1997, *et seq.*, found in the Prison Litigation Reform Act of 1995 ("PLRA") are applicable to this action.

The critical amendment limits the rate under which attorneys fees may be awarded pursuant to 42 U.S.C. § 1988. *See* 42 U.S.C. § 1997e(d) (as amended by the PLRA). If this particular amendment applies to the present action, a class action on behalf of juveniles held in juvenile detention facilities, it would significantly modify the rate at which plaintiff's counsel could be reimbursed. For the reasons discussed below, the court finds that this portion of the PLRA amendments does not apply to the present action.[5]

Resolution of this issue is not straightforward because the PLRA made significant modifications to three different sets of laws, Titles 18, 28 and 42 of the United States Code. Only the amendments to Titles 18 and 42 are relevant here. The attorney fees limitation is found only in the Title 42 amendments. By contrast, the only clear indication that any of the amendments would apply to juveniles held in juvenile detention facilities is found in Title 18. To apply the attorneys fee limitation to actions such as the present, therefore, would require reading a definition from the amendments to Title 18 into Title 42. This court

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[5] Were this court find the limitation on the rates which could be charged to be applicable, it would award fees for each attorney's time at the maximum rate allowed by the statute which this court understands to be $112.50 per hour. This court does not read the statute to apply to the paralegal fees.

does not believe this to be the proper reading of the amendments for reasons discussed below.

First, it must be considered that Title 18 and Title 42 were clearly intended to deal with different sets of concerns. The relevant portions of Title 42 deal with available remedies for inadequate conditions in various institutions. 42 U.S.C. § 1997. For the purposes of these provisions, institutions are defined to include a variety of subcategories one of which includes any "jail, prison or other correctional facility." 42 U.S.C. § 1997(1)(B)(ii). Other subcategories of the institution definition cover mental hospitals, homes for the disabled or elderly and juvenile facilities. 42 U.S.C. § 1997(1)(B). The subsection defining juvenile facilities is not only a separate subcategory from the "jail, prison, or other correctional facility" definition but covers those institutions caring for neglected or ill children as well as those facilities holding juveniles awaiting trial or who have been adjudicated delinquent.

By contrast, the relevant provisions of Title 18 are entitled "Crimes and Criminal Procedure." The PLRA amendments to Title 18 relate to the appropriate remedies for prison overcrowding. The subject matter of the PRLA amendments significantly changed the scope of Title 18 as previously enacted.

In light of these distinctions in the basic purposes and scope of the two titles, this court will not presume that whatever changes were made to one title by the PRLA should necessarily be read into the other title. More specifically, the court will not read a definition found in Title 18 into Title 42.

The amendments to both Titles 18 and 42 include certain new or modified definitions. While there are some similarities in the new definitions, there are also significant differences. For instance, Congress defined "prisoner" in the amendments to both titles. While similar, the two definitions of prisoner are not identical. *See* 42 U.S.C. § 1997e(h) and

18 U.S.C. § 3626(g)(3) (both definitions would, however, appear to this court to include juveniles). By contrast, Congress defined "prison" only in the amendments to Title 18. That definition covers juvenile detention facilities. 18 U.S.C. § 3626(g)(5). Given the ease with which the new Title 18 definition could have been included in Title 42 had Congress so intended, this court will not presume the failure to include it to be inadvertent, particularly in light of Title 42's separate treatment of the subcategories of institution.

This court concludes that the failure to include the definition of prison in Title 42 was intentional. This conclusion is further supported by: (1) the distinct differences between the ability of juveniles and adults to protect their own interests; (2) the probability that juveniles' rights will be pursued only in class actions which require a higher level of legal skill and long term commitment of counsel; and (3) the clear distinction between juvenile facilities and adult prisons evidenced in 42 U.S.C. § 1997e. There are also significant distinctions within Title 42 which treat juvenile facilities differently than adult prison facilities.

As originally enacted, 42 U.S.C. § 1997 made an express distinction between adult prisons and juvenile facilities including in the remedies available. *See, e.g.*, 42 U.S.C. § 1997a(a) (action by the attorney general is more limited as to the conditions in a "jail, prison or other correctional facility" than as to the conditions in the other subcategories of institution). These distinctions which predate the PRLA, convince this court that when this subtitle was originally enacted, Congress recognized a distinct difference in the purposes of adult prisons and juvenile facilities as well as a difference in the ability of those held in these two different forms of institution to protect their own interests.[6] Congress, therefore, chose to treat incarcerated

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[6] While *pro se* actions from adult prisoners are nearly overwhelming the court system, this court cannot recall ever having

juvenile more like persons in mental facilities or homes for the disabled than like adult prisoners.

This court does not believe that Congress meant to change this distinction as to this subtitle when it enacted the PLRA. This conclusion is supported by the facts that neither the initial definition section (distinguishing "jails, prisons or other correctional facilities" from juvenile institutions) nor the referenced limitations on attorney general actions were changed by the PLRA amendments.

Finally, the court finds logic in Congress' apparent intent to include juveniles within the definition of prisoner yet to exclude juvenile detention facilities from the limitations imposed on attorneys fees under Title 42. This would simply place juveniles who have been transferred to adult facilities on the same footing as other adult prisoners. These juvenile prisoners would, necessarily, be older juveniles which the state has, for one reason or another, found appropriate to treat as adults. Their inclusion within the definition of "prisoner" would preclude having two different sets of rules applicable to actions brought by prisoners of different ages held in the same adult facilities.

For these reasons, this court concludes that the PRLA amendments to Title 42, most specifically the provisions limiting the rate at which counsel can be compensated, are not applicable to the present action even though the amendments to Title 18 would appear to apply to the present action. Having no other challenge from defendant to the fees and expenses sought, and having carefully reviewed the fee

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received a *pro se* complaint from a juvenile detainee. Even actions by counsel on behalf of juvenile detainees are infrequent. This court is unwilling to assume that Congress intended the PLRA amendments to address a problem which does not exist. This is particularly so since such a Congressional remedy would drastically alter the rights of juveniles, a group ill equipped to protect themselves, to a point which might effectively bar them from any ability to protect their interests.

submission, the court finds that the following amounts are properly payable to counsel for the plaintiffs:

FOR MAY 1996 --

Fairey, Parise, and Mills, P.A.

Fees requested:	$ 6,326.75
AWARDED:	$ 6,326.75
Costs requested:	$ 249.30
AWARDED:	$ 249.30

South Carolina Protection and Advocacy System for the Handicapped, Inc.

Fees requested:	$ 1,879.50
AWARDED:	$ 1,879.50
Costs requested:	$ 44.11
AWARDED:	$ 44.11

FOR JUNE 1996 --

Fairey, Parise, and Mills, P.A.

Fees requested:	$13,694.25
AWARDED:	$13,694.25
Costs requested:	$ 815.20
AWARDED:	$ 815.20

South Carolina Protection and Advocacy System for the Handicapped, Inc.

Fees requested:	$ 1,330.00
AWARDED:	$ 1,330.00
Costs requested:	$ 45.39
AWARDED:	$ 45.39

FOR JULY 1996 --

Fairey, Parise, and Mills, P.A.

Fees requested:	$ 6,001.25
AWARDED:	$ 6,001.25
Costs requested:	$ 269.30
AWARDED:	$ 269.30

South Carolina Protection and Advocacy System for the Handicapped, Inc.

Fees requested:	$ 1,067.50
AWARDED:	$ 1,067.50
Costs requested:	$ 33.66
AWARDED:	$ 33.60

Summary of Total Fees Awarded

Wherefore, this court orders defendant to pay attorneys fees and costs to plaintiffs' counsel in the total amounts set out below:

Fairey, Parise, and Mills, P.A.

Fees awarded:	$59,381.50
Costs awarded:	$ 3,161.37
TOTAL:	$62,542.87

South Carolina Protection and Advocacy System for the Handicapped, Inc.

Fees awarded:	$ 7,290.50
Costs awarded:	$ 317.98
TOTAL:	$ 7,608.48

IT IS SO ORDERED.

/s/_____
Joseph F. Anderson, Jr.
United States District Judge

August 30, 1996
Columbia, South Carolina

FILE COPY
UNITED STATES COURT OF APPEALS
FOR
THE FOURTH CIRCUIT

Entered: July 29, 1997

No. 96-1950
CA-90-3062-3-17

ALEXANDER S.; ALFRED S.; BENNY B.; CHRISTOPHER M.; LAFAYETTE M.; RICKY S.; by and through their Guardian ad Litem; LESLY A. BOWERS, Guardian ad Litem

Plaintiffs- Appellees

and

INEZ MOORE TENENBAUM, individually and as a representative of a class of juveniles

Plaintiff

v.

FLORA BROOKS BOYD, individually and in her official capacity as Director of the Department of Juvenile Justice

Defendant - Appellant

and

RICHARD E. MCLAWHORN, individually and in his official capacity as former Commissioner of the Department of Juvenile Justice for the State of South Carolina; JOHN F. HENRY; FRANK MAUDLIN; KATHLEEN P. JENNINGS; JOSEPH W. HUDGENS; KAROLE JENSEN; J. P. NEAL; individually and in their official capacities as former Board Members for the South Carolina Department of Juvenile Justice; SOUTH CAROLINA DEPARTMENT OF YOUTH SERVICES;

Defendants

MICHAEL W.MOORE, Director of the South Carolina Department of Corrections

Party in Interest

v.

RICHARD A. HARPOOTLIAN, in his official capacity as the Solicitor for the Fifth Judicial Circuit

Amicus Curiae - Movant

No. 96-2589
CA-90-3062-3-17

THOMAS DAVIS

Special Master

ALEXANDER S.; ALFRED S.; BENNY B.; CHRISTOPHER M.; LAFAYETTE M.; RICKY S.; by and through their Guardian ad Litem; LESLY A. BOWERS, Guardian ad Litem

Plaintiffs - Appellees

and

INEZ MOORE TENENBAUM, individually and as a representative of a class of juveniles

Plaintiff

v.

FLORA BROOKS BOYD;

Defendant - Appellant

RICHARD A. HARPOOTLIAN, in his official capacity as the Solicitor of the Fifth Judicial Circuit

Movant

and

RICHARD E. MCLAWHORN, individually and in his official capacity as former Commissioner of the Department of Juvenile Justice for the State of South Carolina; JOHN F. HENRY; FRANK MAULDIN; KATHLEEN P. JENNINGS; JOSEPH W. HUDGENS; KAROLE JENSEN; J. P. NEAL, individually and in their official capacities as former board members for the South Carolina Department of Juvenile Justice; SOUTH CAROLINA DEPARTMENT OF YOUTH SERVICES;

Defendants

MICHAEL W. MOORE, Director of the South Carolina Department of Corrections

Party in Interest

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

Appellees filed a petition for rehearing with suggestion for rehearing in banc.

Joining Judge Murnaghan for rehearing was Judge Hall.

A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Chief Judge Wilkinson and Judges Russell, Widener, Ervin, Niemeyer, Hamilton, Luttig, Williams, Michael and Motz voted to deny rehearing in banc. Judge Wilkins recused himself from the vote.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Williams for the Court.

For the Court,

/s/ Patricia S. Connor
Clerk

bcc: Honorable Francis D. Murnaghan Jr.
Circuit Judge

Honorable Diana G. Motz
Circuit Judge

Honorable Karen J. Williams
Circuit Judge

No. 97-737

Supreme Court, U.S.
FILED
DEC 29 1997
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1997

ALEXANDER S., et. al.

Petitioners,

v.

FLORA BROOKS BOYD, in her capacity as Director of the Department of Juvenile Justice,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WOODWARD, COTHRAN & HERNDON
Edward M. Woodward, Jr.
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Counsel for Respondent

80 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 5

ARGUMENT I 6

ARGUMENT II 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Alexander S. v. Boyd,
876 F.Supp. 773 (D.S.C. 1995) . . 1, 3

Ex parte Gilliam, 26 C.2d 860,
161 P.2d 793 (1945) 13

Helvering v. Hammel,
311 U.S. 504 (1940) 12

In Interest of V.P.,
139 Ill.App.3d 786,
487 N.E.2d 638 (1985) 13

People v. Thomas, 58 Mich.App. 9,
226 N.W.2d 734 (1975) 13

Rum Creek Coal Sales, Inc. v.
Caperton, 31 F.3d 169
(4th Cir. 1994) 5, 6

U.S. v. American Building
Maintenance Industries,
422 U.S. 271 (1975) 12

FEDERAL STATUTES

PLRA § 802(a)(g)(7) 7

18 U.S.C. § 3626(g)(3) 6

18 U.S.C. § 3626(g)(5) 12

18 U.S.C. § 3006A 8, 10

20 U.S.C. Section 1400 et. seq. . . . 3

29 U.S.C. § 794 3

42 U.S.C. § 1988 . . . . . 1, 5, 9, 10

42 U.S.C. § 1983 . . . . . 1, 3

42 U.S.C. § 1997e 5, 6, 15

42 U.S.C. § 1997e(d) 5, 6, 8, 9, 11, 12

42 U.S.C. Section 12201 et. seq. . . 3

JURISDICTIONAL STATEMENT

This appeal arises from the decision of the United States Court of Appeals for the Fourth Circuit entered May 28, 1997, reversing the decision of the United States District Court for the District of South Carolina on two orders awarding attorneys' fees and expenses pursuant to 42 U.S.C. § 1988 to the Plaintiffs in an underlying 42 U.S.C. § 1983 action. See, Alexander S. v. Boyd, 876 F.Supp. 773 (D.S.C. 1995). The Petitioners timely filed a Petition for Rehearing and Suggestion of Rehearing En Banc, which was denied by Order of the Fourth Circuit entered July 29, 1997.

Petitioners assert they filed their Petition for Writ of Certiorari on October 24, 1997. The initial notice which Respondent received was a docketing sheet from this Court sent by the National Prison Project on November 4, 1997 via Federal Express to Respondent's law firm, to 1500 Hampton Street--an address which is more than six years old. That docketing sheet was forwarded by Federal Express to Counsel for Respondent on November 7, 1997. When Counsel for Respondent contacted Counsel for Petitioners, she was informed that that address was on the original pleadings in this case, and that the ACLU did not have our current address.

When informed that we had never received the three copies of the Petition for Writ of Certiorari required by Supreme Court Rule 29 (3) and that the single docketing sheet which we received had been sent to a previous address, Counsel for Petitioners then mailed via Federal Express one copy of the Petition for Writ of Certiorari, which we received November 14, 1997.

On November 21, 1997, the Lex Group mailed to Counsel for Respondent, via U. S. Mail, an affidavit of service that three copies of the Petition and the Appendix had been re-served on Counsel for Respondent. An Affidavit of Service was included that the LEX Group had served on Counsel for Respondent three copies of the Petition at our current address on October 24, 1997.

Counsel for Respondent maintains that neither filing nor service were timely in accordance with Supreme Court Rule 13, and the Petition for Writ of Certiorari was jurisdictionally out of time, and should be dismissed.

STATEMENT OF THE CASE

This case consolidates the appeal of two District Court Orders awarding attorneys' fees and costs to Plaintiffs' counsel. The award was made to two law firms which jointly represented a class of juveniles challenging the conditions

of their confinement in institutions operated by the South Carolina Department of Juvenile Justice [hereinafter referred to as "DJJ"].

On December 28, 1990, the Plaintiffs filed the underlying action seeking declaratory and injunctive relief, along with damages, from DJJ. The Plaintiffs' case arose under 42 U.S.C § 1983 and three interrelated federal education statutes: the Individuals with Disabilities Education Act, 20 U.S.C. Section 1400 et. seq. ("IDEA"); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"); and the Americans with Disabilities Act, 42 U.S.C. Section 12201 et. seq. ("ADA"). The case was tried before the District Court in June through August of 1994, and the District Court issued an Order on January 25, 1995. See Alexander v. Boyd, 876 F. Supp. 773 (D.S.C. 1995). The Court found certain aspects of the confinement of the class of juveniles unconstitutional, and ordered the Department of Juvenile Justice to implement a corrective plan. The Court denied damages as a remedy but awarded attorneys' fees to plaintiffs' counsel, which fees have been paid. A hearing was held at Plaintiffs' insistence in December, 1995, on the sole issue of juvenile-on-juvenile violence.

On February 16, 1996, the district court issued an Interim Order on Staffing

Issues and Attorney's Fees which specified the procedure the parties were to follow regarding Plaintiffs' applications for attorneys' fees. Plaintiffs have submitted monthly applications to the Court. This appeal involves the fees for the period from February through July, 1996 and December 1995 through January 1996.

STATEMENT OF FACTS

From December 18 through 20, 1995, Plaintiffs' motion to modify DJJ's remedial plan on the issue of staffing was heard by the District Court. During the hearing, DJJ proposed a new staffing plan which the Court permitted DJJ to implement in its Order dated February 16, 1996. Subsequently, Plaintiffs' counsel submitted an application for payment of attorneys' fees including time spent relating to their motion on the staffing issue. By Order dated May 29, 1996, the District Court awarded attorneys' fees to Plaintiffs over DJJ's objection that the results obtained by Plaintiffs did not justify the award of the full amount.

Plaintiffs subsequently filed additional monthly applications for awards of attorneys' fees with the Court for the months of February through July, 1996. In its Order dated August 30, 1996, the District Court awarded fees to

Plaintiffs based on these monthly applications.

It is important to recognize that both Orders on appeal issued after the date on which the amendments to 42 U.S.C. § 1997e became effective on April 26, 1996. The District Court, however, ruled that those amendments did not apply to this case. (Order dated August 30, 1996 at J.A. p. 72).

SUMMARY OF THE ARGUMENTS

Argument I

The Prison Litigation Reform Act of 1995 ("PLRA") is applicable to Plaintiffs' Counsels' applications for fees for the months of May, June, and July, 1996 as well as December, 1995 and January, 1996. 42 U.S.C. § 1997e(d), as amended by the PLRA, requires that Plaintiffs' Counsels' hourly rate be capped at $112.50 per hour, rather than the proposed $225.00 per hour.

STANDARD OF REVIEW

The usual scope of review of an award of attorneys' fees under 42 U.S.C. § 1988 is whether the District Court abused its discretion. Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169 (4th Cir. 1994). This deferential standard of review is modified by a closer review,

when, as in this case, an issue of statutory construction is involved. Rum Creek Coal Sales, Inc., supra at 174.

I. The Amendments to 42 U.S.C. § 1997e Require That the Hourly Rate Used to Compute The Plaintiffs' Award of Attorneys Fees Be Reduced.

After the Court issued its Interim Order on Staffing Issues and Attorneys' Fees on February 16, 1996, Plaintiffs have submitted monthly Motions for Fees and Costs pursuant to 42 U.S.C. § 1988 for services performed by Fairey, Parise & Mills ("FP&M").

DJJ submits that the Prison Litigation Reform Act of 1995 ("PLRA") affects those fee awards. The amendments to 42 U.S.C. § 1997e(d) increase the Plaintiffs' burden of proof to establish entitlement to an award of fees and limit the hourly rate on attorneys' fee awards. Moreover, the statute is retroactive insofar as it affects work done but not compensated prior to the effective date of the act.

There is no vested right to any hourly attorneys' fee.
Plaintiffs' counsel do not have a vested right to the $225 per hour fee which was awarded in the January 1995 Order on the merits. What constitutes reasonable attorneys' fees must be determined by a trial court in retrospect, after ruling

on the merits of the case. Attorneys' fees are not awarded prospectively because there is no basis for a trial judge to evaluate the extent to which the moving party has prevailed.

By amending the fee portions of the PLRA, Congress clearly intended to limit the hourly attorneys' fees which could be recovered by a prevailing party in prison litigation. In the present case, the first Order awarding attorneys' fees was not entered until May 29, 1996, one month after the effective date of the amendments to the PLRA. However, that order was not a final order on the merits. Based on the clear legislative intent, it was error for the District Court to award fees in excess of the statutory limits established in the PLRA.

The PLRA is expressly retroactive to all awards of "prospective relief"[1]:

> (b) Application of Amendment.-
>
> (1) In General.- Section 3626 of title 18 United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or

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[1]Prospective relief is defined in the PLRA as all relief other than compensatory money damages. PLRA § 802(a)(g)(7).

> after the date of the enactment of this title.

When this section is read as part of a comprehensive legislative scheme, it is clear that Congress intended the amendments to apply retroactively, when, as in this case, "prospective relief" is awarded. That is to say, a fee is not a fee until the Court has awarded it, and the Court should follow the law then in effect in computing a fee. Under the amended version of 42 U.S.C. § 1997e(d) the maximum allowable hourly rate of attorneys' fees is limited to one hundred fifty percent (150%) of the hourly rate established under 18 U.S.C. § 3006A.[2] Because the effective date of the legislation is April 26, 1996, and regardless of whether the amendments should be given retroactive effect, it is clear that the legislation applies to Plaintiffs' present and future applications for attorneys' fees. At the very least, all Court-approved billable hours which Plaintiffs have submitted

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[2]Defendants do not however agree that the amount of the hourly rate should automatically be set at $112.50 for all attorneys involved, and for all time spent on the litigation. The PRLA would make that figure the maximum allowable hourly rate.

since April 26, 1996 should be reduced to a maximum rate of $112.50 per hour.

In its order dated May 29, 1996, the Court declined to rule on the applicability of the PLRA because the services for which fees were sought had been performed before April 29, 1996, the effective date of the legislation. That conclusion is erroneous, because the key date is the date on which fees were awarded rather than the date services were rendered.

The amended version of 42 U.S.C. § 1997e(d) provides:

> (d) ATTORNEY'S FEES. - (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that
>
> > (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18 United States Code for payment of court-appointed counsel. (Emphasis added.)

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statues of the United States (42 U.S.C. 1988).

In District Court, Plaintiffs' counsel conceded that the class members are all "prisoners" under the PLRA (See, Plaintiff's Memorandum of Law at p. 2, n. 1; J.A. at 53) .[3] However, Plaintiffs contended that the limitations on attorneys' fees contained within the PLRA were inapplicable because D.J.J. is not a "jail, prison or other correctional facility." Although Plaintiffs have conceded that they are "prisoners", they challenge the fact that they are "confined within a jail, prison or other correctional facility" within the meaning of 42 U.S.C. § 1997e(d), as amended.

The term "prison" is defined in the PLRA to include "any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of

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[3]The amended version of 42 U.S.C. § 1997e(h) specifically defines the term "prisoner" as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program. The amended version of 18 U.S.C. § 3626(g)(3), which is also part of the Prison Litigation Reform Act of 1995, defines the term "prisoner" in the same fashion.

criminal law." Title VII, Sec. 802, amending 18 U.S.C. § 3626(g)(5) (emphasis added). Clearly, the D.J.J. facilities at issue would be considered a "prison" under that definition. Statutes which are originally part of the same act should be construed together. U.S. v. American Building Maintenance Industries, 422 U.S. 271 (1975); 73 Am Jur2d Statutes § 332 (1974). Following this canon of statutory construction by applying the definition of "prison" in the amended version of 18 U.S.C. § 3626(g)(5) to 42 U.S.C. § 1997e(d) leads to the inescapable conclusion that the limitations imposed upon awards of attorneys' fees by the amendments to 42 U.S.C. § 1997e(d) apply to this case.

Interestingly, the original version of the Civil Rights of Incarcerated Persons Act does not provide a statutory definition of the terms "jail" or "prison" or "other correctional facility". A cardinal rule of statutory construction is that under such circumstances, words in a statute will be given their usual and ordinary meaning. Helvering v. Hammel, 311 U.S. 504 (1940). In numerous decisions around the country, juvenile detention facilities have been considered jails, prisons or correctional

facilities.[4] See, In Interest of V.P., 139 Ill.App.3d 786, 487 N.E.2d 638 (1985); People v. Thomas, 58 Mich.App. 9, 226 N.W.2d 734 (1975); Ex parte Gilliam, 26 C.2d 860, 161 P.2d 793 (1945).

II. This case presents no compelling federal issues for review by this court.

Supreme Court Rule 10 states that certiorari is not a matter of judicial discretion. Certiorari will only be granted for "compelling reasons". The precise issue presented by this case--whether the PLRA Amendments were intended to limit attorney's fees in "prison litigation" except when the "prisoners" happen to be juveniles in a juvenile

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[4]Black's Law Dictionary defines the term "correctional institution" as "a generic term describing prisons, jails, reformatories and other places of correction and detention. Black's Law Dictionary 5th Ed. (1979). "Correction" is also defined as "discipline, treatment, and rehabilitation of offenders through confinement, parole, probation, counseling, etc." Black's Law Dictionary, supra. The very definition of "correction" seems to mirror D.J.J.'s statutory charge, thus, it would seem beyond question that D.J.J. is a correctional institution under the Prison Litigation Reform Act of 1995.

facility-- is so narrow as to lack sufficient importance to make it worthy of consideration by this Court. The Fourth Circuit correctly noted that the fee limitations do not undermine the ability of plaintiffs having meritorious claims to expose unconstitutional prison conditions. (See App. at 22-23). Further, the maximum allowable hourly rate of $112.50 is not so low as to preclude access to counsel.[5]

Contrary to Petitioners' Counsels' assertions, it would be manifestly unjust to continue to allow Petitioners' counsel to be paid at the rate of $225 per hour for monitoring which has been ongoing for almost three years. The amendments to the PLRA limited awards of attorneys' fees in all prison litigation to a reasonable fee.

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[5]It is interesting to note that Congress still retains the limitations on fees which attorneys may charge in Veteran's Administration cases at $10.00. This limit has been reaffirmed on numerous occasions by this Court.

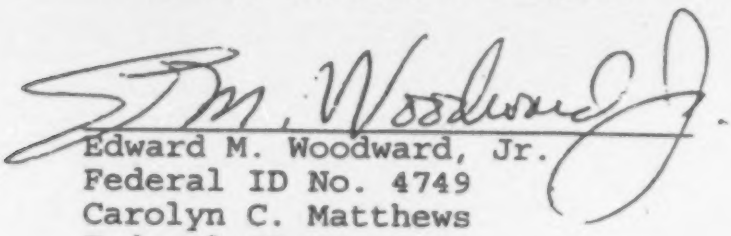
CONCLUSION

Because Plaintiffs are clearly "prisoners" confined in a jail, prison or other correctional facility, the limitations upon awards of attorneys' fees contained in the amendments to 42 U.S.C. § 1997e must be applied in this case. Further, this issue is of such narrow scope that there are not compelling reasons to grant certiorari in this case.

Therefore, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted, this the 29th day of December, 1997, in Columbia, South Carolina.

WOODWARD, COTHRAN & HERNDON



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